FILED
APR 2) 1956
HAROLD B. WILLEY,

No. 886

In the Supreme Court of the United States

OCTOBER TERM, 1955

THE CALIFORNIA OREGON POWER COMPANY, PETITIONER

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SISKIYOU, and THE PEOPLE OF THE STATE OF CALIFORNIA

Petition for a Writ of Certiorari to the Supreme Court of the State of California

GREGORY A. HARRISON
MOSES LASKY
MALCOLM T. DUNGAN
111 Sutter Street,
San Francisco 4, California
Attorneys for Petitioner

BROBECK, PHLEGER & HARRISON
111 Sutter Street,
San Francisco 4, California
Of Counsel.

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	3
State court injunction suit	4
Federal Power Commission proceedings and California intervention therein	4
State court prohibition proceedings after institution of Federal Power Commission case	5
Reasons for granting the writ	6
Conflict with decisions of this Court	7
The decisions of this Court are either being resisted or else need explicit reassertion to avoid misunderstanding	11
Importance of the questions	13
Conclusion	14
Appendix A*—Statutes involved	

*Appendices B through H are separately presented.

CITATIONS

CASES

	Pages
Bethlehem Co. v. State Board, 330 U.S. 767	9, 10
City of Tacoma v. Taxpayers of Tacoma, 43 Wash. 2d 468, 262 P.2d 214	8
City of Tacoma v. Taxpayers of Tacoma, Superior Court, Thurston County, Wash., No. 26572 (March 6, 1956)	12
Dept. of Banking v. Pink, 317 U.S. 264	2
Far East Conf. v. United States, 342 U.S. 570	11
Federal Power Comm'n v. Oregon, 349 U.S. 435	7, 11
First Iowa Coop. v. Power Comm'n, 328 U.S. 152	4, 7, 9, 12
Garner v. Teamsters Union, 346 U.S. 485	11
H. J. Heinz Co. v. Superior Court, 42 Cal. 2d 164, 266 P.2d 5	11
Macauley v. Waterman S.S. Corp., 327 U.S. 540	11
Madruga v. Superior Court, 346 U.S. 556	2
Market St. R. Co. v. Comm'n, 324 U.S. 548	2
Myers v. Bethlehem Corp., 303 U.S. 41	11
State of Wash. Dept. of Game v. Federal Power Comm'n, 207 F.2d 391 (9th Cir.), cert. denied, 347 U.S. 936	8, 12
Thompson v. Texas Mexican R. Co., 328 U.S. 134	11
United States v. Appalachian Power Co., 311 U.S. 377	9, 11

COMMISSION DECISIONS

Bellows Falls Hydro-Electric Corp., 2 F.P.C. 380	5
Bellows Falls Hydro-Electric Corp., 4 F.P.C. 3	10
Holyoke Water Power Co., 8 F.P.C. 471	10
Namekagon Hydro Co., CCH Util. Law Rep. (2d ed.) ¶ 9365, affirmed, 216 F.2d 509 (7th Cir.)	10
Pacific Gas and Electric Co., 2 F.P.C. 392	10
Southern California Edison Co., 8 F.P.C. 364	10

STATUTES

Pages

Federal Power Act, 41 Stat. 1063, 49 Stat. 838, as amended:
§ 4(e) 2
§ 6 14
§ 9(b) 3
§ 10(a) 3, 10
§ 10(b) 3
§ 10(c) 3, 4, 10
§ 10(g) 3, 10
§ 26 ..... 3, 10, 11
§ 27 3
§ 28 3
§ 306 3
§ 313(b) 3, 11
§ 314(a) 3, 11
§ 316 10
§ 317 ..... 3, 11

Judicial Code, 28 U.S.C.:
§ 1257(3) 2
§ 2101(c) 2

Calif. Code Civ. Proc. § 1218 10

MISCELLANEOUS

Sen. Rep. 179, 65th Cong., 2d Sess. 13

Fed. Power Comm'n, 34th Ann. Rep. 13

Opinion of the Attorney General of Oregon (Feb. 29, 1956) 12

Calif. Rules on Appeal, R. 27(b) 2

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. .....

THE CALIFORNIA OREGON POWER COMPANY, PETITIONER

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SISKIYOU, and THE PEOPLE OF THE STATE OF CALIFORNIA

Petition for a Writ of Certiorari to the Supreme Court of the State of California

The California Oregon Power Company prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California in the case entitled "*The California Oregon Power Company*, a corporation, Petitioner, vs. *The Superior Court of the State of California, in and for the County of Siskiyou*, Respondent; *The People of the State of California*, Real Party in Interest", Sac. No. 6601.

OPINIONS BELOW

The opinion of the court below (Appendix B,[1] R. 176) is reported in 45 Adv.Cal. 882 and 291 P.2d 455. It superseded an opinion of the California District Court of Appeal, Third Appel-

1. Appendix B, together with other material required by Rule 23 to be appended, is presented in a separate volume entitled "Appendices B Through H to Petition for Writ of Certiorari". Appendix A, statutes, is attached.

late District (Appendix C, R. 156) which is reported in 130 Adv. Cal.App. 788, 279 P.2d 807, and CCH Util. Law Rep. (State Vol.) ¶ 16,770.

JURISDICTION

The decision below, which constitutes the judgment (R. 203), was rendered December 29, 1955 (R. 176, 198). A petition for rehearing was filed January 13, 1956 (R. 198), in time under Calif. Rules on Appeal, Rule 27(b), and denied January 25, 1956 (R. 199). The present petition for certiorari is therefore timely. 28 U.S.C. § 2101(c); *Market St. R. Co. v. Comm'n,* 324 U.S. 548, 552; *Dept. of Banking v. Pink,* 317 U.S. 264, 266. The State Supreme Court's judgment, denying a writ of prohibition, is a final judgment reviewable here by writ of certiorari under 28 U.S.C. § 1257(3). *Madruga v. Superior Court,* 346 U.S. 556, 557 n. 1.

QUESTIONS PRESENTED

1. Under the Federal Power Act, does a state court have jurisdiction to control the manner of operation of a hydroelectric plant in a navigable stream, as a means to preserve fish life and protect the safety of persons who use the river for recreational purposes, or are these matters exclusively for the Federal Power Commission?

2. Where the Federal Power Commission has jurisdiction over the subject-matter and has asserted it, and the litigant has sought relief from the Commission, does a state court have jurisdiction to adjudicate the same controversy at the behest of the same litigant?

STATUTES INVOLVED

The statute is the Federal Power Act, 41 Stat. 1063, as amended, 49 Stat. 838; 16 U.S.C. §§ 791a-825r. The pertinent provisions of the sections most directly involved are:

> SEC. 4. The [Federal Power] Commission is hereby authorized and empowered—* * *
>
> (e) To issue licenses * * * to any corporation organized under the laws of * * * any State * * * for the purpose of

constructing, operating, and maintaining dams, * * * power houses, * * * or other project works * * * along * * * or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce * * * [41 Stat. 1065, 49 Stat. 840, 16 U.S.C. § 797(e)].

SEC. 10. All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted * * * shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway * * * for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; * * *

(c) That the licensee * * * shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. * * * [41 Stat. 1068, 49 Stat. 842, 16 U.S.C. § 803(a), (c)].

Sections 6, 9(b), 10(b), 10(g), 26, 27, 306, 313(b), 314(a) and 317, being lengthy, are printed in Appendix A, *infra*.

STATEMENT

The Klamath River is a navigable waterway rising in Oregon and flowing through California to the Pacific Ocean (R. 4, 137, 139). Petitioner, a public utility electric company operating in northern California and southern Oregon (R. 176), owns two hydroelectric plants on the Klamath in California, known as Copco No. 1 and Copco No. 2 (R. 4, 177). These are "peak-load" plants, which store water at night and on weekends for use in supplying daytime peak demands. The result is a daily variation in the amount of water flowing through the plants and thus a periodic fluctuation of the level of the Klamath River downstream (R. 4-5, 177). This has been going on since the plants were built nearly 40 years ago (R. 4-5, 18-20, 177).

State court injunction suit.

June 19, 1950, at the instance of its Fish and Game Commission, California filed suit against petitioner in the State Superior Court for Siskiyou County (R. 17-23). Its complaint alleged that the fluctuations described above had two harmful results: the lowering of the water destroyed many fish, the property of the State (R. 20); the rising of the water endangered fishermen (R. 21-22). It prayed that petitioner be enjoined from operating the dams so as to create these fluctuations and from interfering with the continual and normal flow of the river, all as the "abatement" of a "nuisance" (R. 22).

Petitioner immediately raised the federal questions, by demurring to the complaint on the ground that its self-disclosed subject-matter was the effect of the operations of hydroelectric plants in a navigable river on "life, health, and property", a subject which § 10(c) of the Federal Power Act entrusts exclusively to the Federal Power Commission. *First Iowa Coop. v. Power Comm'n*, 328 U.S. 152, was cited (R. 24, 29; Appendix F. pp. 48, 49).

The demurrer being overruled (R. 9, 34), petitioner raised the same federal questions by answer (R. 10, 35, 43-45, Appendix F, pp. 39, 49, 51-53).

Federal Power Commission proceedings and California's intervention therein.

November 27, 1951 the Federal Power Commission ordered petitioner to show cause why the Copco plants and other projects on the Klamath should not be licensed under the Federal Power Act (R. 74; Appendix F, p. 55).[2]

The State of California then filed a petition for leave to intervene, in which it incorporated its entire State court complaint, and prayed that the Commission require petitioner either to build a

2. The proceeding was consolidated with a proceeding instituted by a prior application by petitioner for a license for a proposed new plant (R. 137).

re-regulating dam at Iron Gate (below the Copco plants), in order to smooth out the fluctuations, or to change its method of operation of the plants so as not to destroy fish and endanger fishermen (R. 11, 78-81). At a hearing held by the Commission, California pressed its claims (R. 11-12, 121). Its petition for intervention was granted (R. 85).

January 28, 1954, the Commission held that the Klamath was navigable and that it had jurisdiction over the Copco dams on that and other grounds (R. 134-144; Appendix D). Following its usual procedure in such cases (*Bellows Falls Hydro-Electric Corp.*, 2 F.P.C. 380, 387), the Commission reserved jurisdiction "in the interests of protection of life, health, and property, to require installation of re-regulating facilities" in license proceedings to follow (R. 150-151; Appendix E, p. 33).

State court prohibition proceedings after institution of Federal Power Commission case.

Meanwhile, petitioner again presented the federal questions in the state injunction suit by motions to dismiss or stay and for leave to amend its answer to allege California's participation in the Power Commission proceedings (R. 12-14, 87-103; Appendix F, pp. 41-42, 53-58). These motions were denied (R. 14, 104; Appendix F, p. 42).

When the State then sought an immediate trial, petitioner applied to the State District Court of Appeal for a writ of prohibition against prosecution of the State injunction suit (R. 3) and obtained an alternative writ on February 29, 1953 (R. 106, 107). The petition for prohibition raised the federal questions here presented and was based on them (Appendix F, pp. 38-42). While the prohibition matter constitutes an independent proceeding, the petition incorporated the pleadings in the injunction suit and the proceedings before the Power Commission, which thus became part of this record (R. 17-104).

February 10, 1955, the District Court of Appeal ordered a peremptory writ of prohibition to issue (R. 156, 174; Appendix

C). Holding that the Federal Commission has exclusive jurisdiction over the dams and their operation, it noted that California's injunction suit sought "to interfere with, regulate, alter or control" petitioner's power installations, and that, while "the state asserts that it is only seeking to abate a nuisance and prevent destruction of life and property", the supposed nuisance "can only be abated by the cessation" of petitioner's operation of the Copco dams "or the installation of a regulating dam at [Iron Gate]" (R. 169-170; Appendix C, pp. 25-26). It held that California must therefore pursue its remedy before the Commission.

The California Supreme Court then granted a hearing in the prohibition suit (R. 175) and thereafter discharged the alternative writ and denied the petition (R. 197). The gist of its reasoning was that "the field is not exclusively occupied for all purposes by the Federal Power Act or the Federal Commission", that "there is a duality of control the extent of which is not specified", and that while the State may not veto projects licensed by the Federal Commission, "that is, the state may not block the project completely", it may abate "nuisances or danger to the public". It held that the state Superior Court had jurisdiction to compel the dams to "be so operated as to not create the danger to the public and the destruction of the fish" (R. 191-192; Appendix B, pp. 11-12).

This is the decision we pray the Court to review.[3]

REASONS FOR GRANTING THE WRIT

The basic issue is the relationship of state and federal power as respects hydroelectric installations to which the federal authority reaches under the Federal Power Act.

The Supreme Court of California has decided that federal question—which is a matter of vital public importance—in a manner contrary to the governing decisions of this Court.

---

3. By subsequent stipulation, all proceedings in the injunction suit have been stayed pending application here for certiorari (R. 200).

Conflict with decisions of this Court.

In *First Iowa Coop. v. Power Comm'n*, 328 U.S. 152, the Court comprehensively treated the subject. It held that "Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority" and that the "Act places the responsibility squarely upon federal officials and usually upon the Federal Power Commission" (328 U.S. at 168). In support of these principles the Court cited the very sections of the Act which give the Power Commission jurisdiction over the Copco Dams, including jurisdiction to protect life, health and property.

Last term, in *Federal Power Comm'n v. Oregon*, 349 U.S. 435 (the *Pelton* case), the Court applied these principles to the very questions here involved, the regulation of a dam and its operations to protect fish. Oregon asserted that the matter was reserved to state control (Brief for Respondents, p. 31, Oct. Term, 1954, No. 367). In holding otherwise, this Court noted the inescapable fact that (p. 449):

> The first consequence [of operating the dam] is the inevitable variation in, or the temporary interruption of, the flow of the stream.

It held that the jurisdiction and responsibility of overcoming any undesired consequences of this fact are in the Commission, saying,

> The Commission is satisfied that it has overcome this objection by its provision for a reregulating dam. * * * In this reregulation of the flow of the stream, the Commission acts on behalf of the people of Oregon, as well as all others, in seeing to it that the interests of all concerned are adequately protected.

In short, it held that the effect of the project upon fish was for the Commission, not state agencies, to consider (349 U.S. at 452).

The principles of the *First Iowa* decision have also been applied

to the problem of this case by both the Ninth Circuit and the Supreme Court of Washington. In *State of Wash. Dept. of Game v. Federal Power Com'n*, 207 F.2d 391 (9th Cir.), state agencies and citizen groups interested in fish protection opposed a license for the *Coulitz* project in Washington. They objected that the applicant had not obtained approval by the State Directors of Fisheries and of Game of plans to protect fish life, as required by State law. The Ninth Circuit held that the Federal Power Commission had exclusive jurisdiction over the problem (207 F.2d at 397-98). This Court denied certiorari, 347 U.S. 936. The same state agencies and groups made the same objections in state court proceedings. In *City of Tacoma v. Taxpayers of Tacoma*, 43 Wash. 2d 468, 493, 262 P.2d 214, 228, the Washington Supreme Court held that

> It is the Federal power commission rather than the director of fisheries and the director of game of the state of Washington which under our constitutional government must pass upon the measures necessary for the protection of anadromous fish in the navigable streams in this state on behalf of the people of Washington as well as on behalf of all the people of the United States.

Unlike Oregon in the *Pelton* case and Washington in the *Coulitz* cases, California does not deny the Federal Power Commission's jurisdiction. It admits that the Commission has full jurisdiction to prescribe conditions for the operation of the Copco dams, including the requirement of a re-regulating dam, in order to protect lives and fish. Under the provisions of the Federal Power Act, it presented to the Commission the same complaint it had filed in the state court, and prayed for the same relief, and it has formally admitted that its purpose in intervening was "to secure the Commission's order requiring [petitioner] to construct the Iron Gate" re-regulating dam (R. 121). Responsive to that intervention, the Commission assumed jurisdiction to determine

California's right to the relief and has reserved the determination of the necessity of stream re-regulation for protection of life, health and property. Necessarily, any jurisdiction California's own courts could have had, in the absence of the Power Act, to "abate a nuisance" attributable to the operation of the Copco dams has been superseded, for, as said by this Court in the *First Iowa* case (328 U.S. at 181),

> The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls.

The Supreme Court of California concedes that the State may not block the project, but it reasons that the "Siskiyou court * * * may find means to alleviate the alleged nuisance without substantially interfering with the power output of the dams" and argues that California may do so as a "local police measure" (R. 192; Appendix B, p. 12). "But the power to decide a matter can hardly be made dependent on the way it is decided," *Bethlehem Co. v. State Board,* 330 U.S. 767, 775, and where "national planning and control" apply, they supersede the local police power. *United States v. Appalachian Power Co.,* 311 U.S. 377, 426-27.

The quoted statement of the court below tacitly presents several questions. For example, (1) Does the alleged "nuisance" really exist; *i.e.,* does the operation of the Copco dams really endanger lives and fish? (2) If so, should the power output be interfered with at all? (3) Is a particular interference "substantial"? (4) Do feasible means of alleviation exist? Each of these questions has been entrusted to the Power Commission, not the Siskiyou court, to inquire into and decide.

When the Power Commission comes to pass on the reserved questions, it may (1) find that it is not true that the operation of the Copco dams endangers lives and fish, or (2) while finding the charge true, conclude that the overriding purposes of the Power

Act require continued operation without any change designed to eliminate these unfortunate by-products, or (3) concluding that some changes or alterations are necessary and feasible to lessen or eliminate the by-products, prescribe what the remedy shall be. Under § 10(a), (c), and (g) of the Federal Power Act, licenses are conditioned upon the project being what in the judgment of the Commission—not of a state trial court—is best adapted to a comprehensive plan of water-resource development for all public uses, including recreational purposes; the Commission—not a state court—is given authority to require such modification of a project as will best reconcile a comprehensive plan for the production of the most economic amount of power with the protection of life, health and property.[4]

Should a state court intrude upon any of the foregoing questions, it will either reach the identical conclusions as the Power Commission or contrary and inconsistent conclusions. If the former, its intrusion will be pointless but harassing. If the latter, it will be pernicious. "The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict". *Bethlehem Co. v. State Board*, 330 U.S. 767, 776. Petitioner would then be faced with conflicting orders, with both of which it could not possibly comply. Violation of either order might entail criminal penalties (Federal Power Act § 316; Calif. Code Civ. Proc. § 1218) or forfeiture or destruction of the projects (Federal Power Act § 26;

4. Under these provisions of the Act the Commission has asserted jurisdiction to require a licensee to generate "the largest amount of power that can be economically produced, regardless of any conflicting State laws", *Holyoke Water Power Co.*, 8 F.P.C. 471, 488, and to rebuild an existing project to the same end, *Bellous Falls Hydro-Electric Corp.*, 4 F.P.C. 3; it has prescribed conditions governing operation of the project, or has denied a license, to protect recreational uses on the stream, *Southern California Edison Co.*, 8 F.P.C. 364; *Pacific Gas and Electric Co.*, 2 F.P.C. 392, 398; *Namekagon Hydro Co.*, CCH Util. Law Rep. (2d ed.) ¶9365, *affirmed*, 216 F.2d 509 (7th Cir.).

H. J. Heinz Co. v. Superior Court, 42 Cal. 2d 164, 176, 266 P.2d 5, 12).

It is exclusively for the Commission to determine the several questions, and then to have its decisions enforced under the comprehensive federal scheme of enforcement provided by the Power Act (§§ 26, 313(b), 314, 317; Appendix A, *infra*, pp. 2, 3, 4). As said in *Garner v. Teamsters' Union*, 346 U.S. 485, 488-91:

> Congress has taken in hand this particular type of controversy * * *. The power and duty of primary decision lies with the Board * * *. The question then is whether the State, through its courts, may adjudge the same controversy and extend its own form of relief.
>
> * * * A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so.[5]

The decisions of this Court are either being resisted or else need explicit reassertion to avoid misunderstanding.

Forty-four of the forty-eight states at one time or another have appeared before this Court to resist, unsuccessfully, the reach of the Federal Power Act.[6] The State authorities in the Western States are either still reluctant to accept this Court's decisions, or else they do not understand them.

For example, notwithstanding this Court's decision in *Federal Power Commission v. Oregon*, 349 U.S. 435, and the Commission's

---

5. See also the cases on primary jurisdiction. *Far East Conf. v. United States*, 342 U.S. 570 (Shipping Act); *Thompson v. Texas Mexican R. Co.*, 328 U.S. 134 (Interstate Commerce Act); cf. *Myers v. Bethlehem Corp.*, 303 U.S. 41 (National Labor Relations Act); *Macauley v. Waterman S.S. Corp.*, 327 U.S. 540 (Renegotiation Act).

6. Forty-one appeared as amici curiae in the *New River* case (*United States v. Appalachian Power Co.*, 311 U.S. 377, 397-98); and nine of these and three others appeared as amici curiae in the *Pelton* case (*Federal Power Comm'n v. Oregon*, 349 U.S. 435, 436-37).

grant of a license, the Attorney General of Oregon has requested the District Attorney of Jefferson County, Oregon, to bring a criminal proceeding against Portland General Electric Co. for starting contruction of the *Pelton* project without state approval, which cannot be given under Oregon law without consent of fish and game authorities. (See letter from the Attorney General of Oregon to the District Attorney dated February 29, 1956, Appendix H). He has given similar instructions to the District Attorney of Baker County to prosecute Idaho Power Co. for starting construction on the Hell's Canyon Dam under a Federal Power Commission license but without a state license (*ibid.*) And despite the grant of a license by the Commission to the City of Tacoma to construct the *Coulitz* project, and the Ninth Circuit's decision in *State of Wash. Dept. of Game v. Federal Power Com'n*, 207 F.2d 391 (9th Cir.), cert. denied, 347 U.S. 936, a Washington state trial court has just enjoined construction of the project (*City of Tacoma v. Taxpayers of Tacoma*, et al., *Superior Court of Thurston County*, No. 26572, March 6, 1956; Appendix G).

The alternative explanation to a reluctance to heed this Court's decisions, coupled with an acuteness in finding points of difference, is that the authorities do not understand the decisions. For example, the Supreme Court of California, in its opinion below, rests on the statements in the *First Iowa* case about a "duality of control" and says (R. 191; Appendix B, p. 11; emphasis added):

> There is a duality of control *the extent of which is not specified.*

If the court below is correct in saying that the extent of the duality *has not been specified*, then it is important that this Court grant the writ in order to make the specification clear. In fact, we submit, the Court *has* specified that in respect to matters over which the Commission has jurisdiction, the states have none; and the writ should be granted to see that the specification is obeyed. The "duality of control", this Court said in the *First Iowa* case (328 U.S. at 167-68),

> consists merely of the division of the common enterprise between two cooperating agencies of government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue.

If the decision below is allowed to stand, it will breed resistance to the Act, uncertainty and litigation.

Importance of the questions.

The importance of the questions is, we submit, self-evident.

There are well over 200 licensed major projects[7] in the United States, located in 36 states, Alaska and Puerto Rico, involving dams on hundreds of rivers and lakes; and new projects are being licensed every year. Fed. Power Comm'n, 34th Ann. Rep. 177, 178, 181-85. If state trial courts in every county in which federally-licensed projects are located are permitted to superimpose their judgment regarding what measures for protection of fish are required on that of the Commission, the result is chaos. The questions are therefore important to the administration of the Federal Power Act.

They are also important to licensees. The legislative history discloses that a major purpose of the Act was to encourage power development by private enterprise.[8] One inducement was the explicit

---

7. Some of these project licenses cover a half dozen or more power plants with their associated dams. For example, petitioner's North Umpqua development, Project No. 1927-Oregon (Fed. Power Comm'n, 34th Ann. Rep. 183) includes seven plants now in operation, and an eighth under construction, all embraced within a single license. The comprehensive plan of Klamath River development proposed by petitioner would include seven new plants (R. 50-51) in addition to the two existing Copco plants.

8. To secure "improvement of navigation in rivers under the jurisdiction of Congress with private capital, as distinguished from appropriations by Congress for that purpose" and to provide "inducement for the investment of private capital in the improvement of navigable streams * * * without which it would not be so invested or improvements made." Sen. Rep. 179, 65th Cong., 2d Sess. 1.

assurance of § 6 that all of the terms and conditions imposed on a licensee would be set out in the license itself (Appendix A, *infra*, p. 1). Major projects cost millions. No licensee can justify the public issue of securities or the investment of its own funds if trust cannot be placed in a license from the Commission as expressing all the terms and conditions to which it will be subjected in the construction, maintenance and operation of the project and if, instead, the project is to be subject to unpredictable requirements of trial courts of every county in which a portion of the project may be located—in many cases, like the present, in more than one state.

CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for a writ of certiorari should be granted.

GREGORY A. HARRISON
MOSES LASKY
MALCOLM T. DUNGAN
Attorneys for Petitioner.

BROBECK, PHLEGER & HARRISON
Of Counsel.

San Francisco, California, April, 1956.

Appendix A follows

(Appendices B through H in separate volume)

APPENDIX A

Statutes Involved

(In addition to those quoted in the body of the petition)

FEDERAL POWER ACT, 41 Stat. 1063, 49 Stat. 838, as amended:

SEC. 6. Licenses under this Part shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe in conformity with this Act, which said terms and conditions and the acceptance whereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission * * *.

* * * * * * *

SEC. 9. That each applicant for a license hereunder shall submit to the commission—* * *

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

* * * * * * *

SEC. 10. All licenses issued under this Part shall be on the following conditions:

(a) [quoted at p. 3 *supra*]

(b) That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alter-

ation or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an installed capacity in excess of one hundred horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.

(c) [quoted at p. 3 *supra*]

(g) Such other conditions not inconsistent with the provisions of this Act as the Commission may require.

* * * * * * *

SEC. 26. That the Attorney General may, on request of the commission or of the Secretary of War, institute proceedings in equity in the district court of the United States in the district in which any project or part thereof is situated for the purpose of revoking for violation of its terms any permit or license issued hereunder, or for the purpose of remedying or correcting by injunction, mandamus, or other process any act of commission or omission in violation of the provisions of this Act or of any lawful regulation or order promulgated hereunder.

* * * * * * *

SEC. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

SEC. 306. Any person, State, municipality or State commission complaining of anything done or omitted to be done by any licensee or public utility in contravention of the provisions of this Act may apply to the Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such licensee or public utility, who shall be called upon to satisfy the complaint or answer

the same in writing within a reasonable time to be specified by the Commission. If such licensee or public utility shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating such complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall find proper.

SEC. 313. * * * (b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * * Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. * * * The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

SEC. 314. (a) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this Act, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States, the Supreme Court of the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this Act or any rule,

regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. * * *

SEC. 317. The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this Act or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, or order thereunder. * * *

APR 2 1 1956
HAROLD B. WILLEY, Clerk

No. 886

In the Supreme Court of the United States

OCTOBER TERM, 1955

THE CALIFORNIA OREGON POWER COMPANY, PETITIONER

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SISKIYOU, and THE PEOPLE OF THE STATE OF CALIFORNIA

Appendices B Through H to Petition for a Writ of Certiorari to the Supreme Court of the State of California

Appendix B: Opinion and Judgment of the Supreme Court of California

Appendix C: Opinion of the District Court of Appeal

Appendix D: Related Opinion of the Federal Power Commission

Appendix E: Related Federal Power Commission Orders

Appendix F: Excerpts From the Record, Showing How the Federal Questions Were Raised

Appendix G: Judgment of the Superior Court of Thurston County, Washington in City of Tacoma v. Taxpayers of Tacoma, No. 26572 (March 6, 1956)

Appendix H: Opinion of the Attorney General of Oregon (February 29, 1956) and Letters to the District Attorneys of Jefferson County and Baker County

GREGORY A. HARRISON
MOSES LASKY
MALCOLM T. DUNGAN
111 Sutter Street,
San Francisco 4, California
Attorneys for Petitioner

BROBECK, PHLEGER & HARRISON
111 Sutter Street,
San Francisco 4, California
Of Counsel

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

INDEX

		Page
Appendix B:	Opinion and judgment of the Supreme Court of California	1
Appendix C:	Opinion of the District Court of Appeal	16
Appendix D:	Related opinion of the Federal Power Commission	29
Appendix E:	Related orders of the Federal Power Commission	32
	Order Issuing License (Major)	32
	Order Requiring Filing of Application or Applications for Licenses for Major Projects	34
Appendix F:	Excerpts from the record, showing how the federal questions were raised	36
Appendix G:	Judgment of the Superior Court of Thurston County, Washington in *City of Tacoma v. Taxpayers of Tacoma*, No. 26572 (March 6, 1956)	59
Appendix H:	Opinion of the Attorney General of Oregon (February 29, 1956) and letters to the District Attorneys of Jefferson County and Baker County	61
	Opinion	61
	Letter to District Attorney of Jefferson County	63
	Letter to District Attorney of Baker County	64

APPENDIX B
(OPINION AND JUDGMENT BELOW)*

In the Supreme Court of the State of California

In Bank

The California Oregon Power Company, Petitioner, vs. The Superior Court of the State of California, in and for the County of Siskiyou, Respondent, The People of the State of California, Real Party in Interest.	Sac. 6601

This is a proceeding in which petitioner, a public utility and California corporation engaged in the production and sale of electricity in Oregon and California, hereafter referred to as defendant, seeks to have the respondent superior court in Siskiyou County prohibited from trying an action pending therein in which the State of California is plaintiff and the power company a defendant.

In its complaint in the above mentioned action filed in June, 1950, plaintiff alleged that Klamath River runs through Siskiyou, Humboldt and Del Norte counties in California (its headwaters are in Oregon) and is navigable from its mouth to its confluence with Shasta River in Siskiyou County; that it is inhabited with fish, is regularly stocked by plaintiff, and the fish spawn in its waters; that the fish are the property of plaintiff and held in trust for its people; that about 1917 defendant built two dams, Copco 1 and 2, across the river at Copco, Siskiyou County, California, which together with hydroelectric generating plants, it uses to produce electricity; that in so maintaining and using those facilities defend-

[*The absence of a separate judgment is explained by the Clerk's certificate at R.203.]

ant controls the natural flow of the river and causes it to fluctuate suddenly by reducing the flow when it is not generating power and increasing the flow when power is being generated; that as a result of such fluctuations large areas of the bed, banks and bars along the river for 75 miles downstream from Copco are and have been suddenly and abruptly uncovered or drained of water when defendant's hydroelectric plants are shut down causing about 1,900,000 fish to die; that when the plants are placed in operation after the temporary shutdown the result is a "wave front" caused by the sudden release of water which is a danger and menace to public safety and welfare, indeed, fourteen persons have been drowned in an eight-year period as a result thereof; that such conduct of defendant constitutes a public nuisance and defendant has refused to take any action to alleviate it. In its complaint plaintiff prayed that the nuisance be abated and defendant enjoined from engaging in such injurious activities.

Defendant demurred to the complaint asserting the court lacked jurisdiction. It also made the same claim in its answer after the demurrer was overruled and by way of motion to dismiss, which motion, also sought leave to amend its answer showing subsequent proceedings before the Federal Power Commission and to abate the action because of those proceedings. The motion was denied.

Defendant contends that the respondent has no jurisdiction because (1) The Federal Power Commission has exclusive jurisdiction under federal law over the location and regulation of dams on navigable streams; (2) plaintiff has failed to exhaust its administrative remedy before that Commission; (3) the California Public Utilities Commission has exclusive state jurisdiction over the issues presented; (4) plaintiff has an adequate remedy at law and hence is not entitled to injunctive relief; and (5) the subject matter is legislative, not judicial.

Turning to the first contention, it appears that defendant never has obtained a license from the Federal Power Commission for its

Copco dams. After the action here involved was commenced and in April, 1951, it filed an application with that Commission to launch Big Bend No. 2 Development which included additional dams one of which (Iron Gate) would allegedly ameliorate the fluctuation of the river. In November, 1951, the Commission ordered defendant to show cause why it should not get licenses for the Copco dams, whether it was violating the Federal Power Act and other matters. Thereafter in June, 1952, plaintiff filed with the Federal Power Commission a petition to intervene in the proceeding before the Commission and set forth the claims made by it in its complaint in the action here involved and asked for relief. Defendant answered plaintiff's petition to intervene setting forth the pleadings in the state court action. The Commission granted plaintiff's petition. Hearings were had by the Commission in 1952 and in 1954 it ordered defendant to file applications for all its power installations on the Klamath River because it maintains dams (Copco 1 and 2) which fluctuate the flow and thus affect navigation and interstate commerce; it reserved jurisdiction to determine whether the construction of any regulating dam such as Iron Gate was necessary to avoid the fluctuation.

The Federal Power Act (16 U.S.C.A. 791, et seq.) creates the Federal Power Commission (Id. 792). It is empowered to investigate water resources and the water power industry and to issue licenses for the purpose "of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states . . . ." (Id., § 797.) It is " . . . unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or

maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States . . . except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter." (Id., § 817.) It may on its own motion order an investigation of occupancy of, for the purpose of developing electric power, streams over which Congress has jurisdiction and " . . . to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region." (Id., § 797(g).) Licenses may be issued for 50 years and conditioned on all the provisions of the act and such further rules as the Commission may prescribe; and licenses may be revoked for the reasons specified in the act (Id., § 799). *Applicants for licenses must submit evidence that they have complied with the laws of the state within which the project is located* " . . . with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter." (Id., § 802(b).) Licenses shall be on the condition that the project will be such as in the judgment of the commission it is best adapted ". . . to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes . . . (Id., § 803(a).) The licensee shall conform to the Commission's rules and regulations "for the protection of life, health, and property" and shall be liable for damages occasioned to the property and others by the maintenance and operation of the project. (Id., § 803(c).) The United States Attorney General may on request of the Commission " . . .

institute proceedings in equity in the district court of the United States in the district in which any project or part thereof is situated for the purpose of revoking for violation of its terms any permit or license issued hereunder, or for the purpose of remedying or correcting by injunction, mandamus, or other process any act of commission or omission in violation of the provisions of this title or of any lawful regulation or order promulgated hereunder. The district courts shall have jurisdiction over all of the above-mentioned proceedings and shall have power to issue and execute all necessary process and to make and enforce all writs, orders, and decrees to compel compliance with the lawful orders and regulations of the commission . . . and to compel the performance of any condition imposed under the provisions of this title." (Id., § 820.) And finally, "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." (Id., § 821.)

The question thus presented is whether the federal government has occupied the field with respect to the maintenance of dams on navigable streams to the exclusion of state jurisdiction; there is no question of federal supremacy in the regulation of navigable streams.

In Ford & Son v. Little Falls Co., 280 U.S. 369, the New York state court, in an action for upstream riparian owners, had awarded damages and injunctive relief against petitioner, a power company, which had a license from the Federal Commission to take water from a federal dam and maintain on the top of the dam flash-boards to facilitate its diversion. The flash-board raised the water level above the dam to the riparian owners' damage. The state law made petitioner's conduct an actionable wrong but it relied on its federal license. The court held that even though the

Commission acted within its jurisdiction in authorizing the project and in the advancement of navigation the Federal Power Act, supra, such act " . . . does not purport to authorize a licensee of the Commission to impair such rights recognized by state law without compensation. Even though not immune from such destruction they are, nevertheless, an appropriate subject for legislative protection." (Ford & Son v. Little Falls Co., 280 U.S. 369, 377.) Reference is made to sections 803(c) and 821, supra, the court stating: "While these sections are consistent with the recognition that state laws affecting the distribution or use of water in navigable waters and the rights derived from those laws may be subordinate to the power of the national government to regulate commerce upon them, they nevertheless so restrict the operation of the entire act that the powers conferred by it on the Commission do not extend to the impairment of the operation of those laws or to the extinguishment of rights acquired under them without remuneration." (Ford & Son v. Little Falls Co., supra, 378). This was reaffirmed in Federal Power Com'n. v. Niagara Mohawk P. Corp., 347 U.S. 239, 74 S.Ct. 487, where later cases to the same effect were cited. While the court speaks of private proprietary rights it stresses the sovereignty of the state.

In First Iowa Coop. v. Power Comm'n., 328 U.S. 152, the petitioner power company applied to the Commission for a license to erect a dam on a navigable stream in Iowa. It did not show in its application (as required by the Federal Power Act, § 802(b), supra) that it had complied with Iowa's legislation that a permit from a state agency must be obtained before any dam could be erected and such erections could only be under certain conditions. The court held that a showing of such compliance was not a condition precedent to securing a license from the Federal Commission. The court stated the question was the need, if any, for petitioner to present evidence to the Commission that he had complied with Iowa law (Federal Power Act, 16 U.S.C.A., § 802(b),

supra). The court said (p. 164): "To require the petitioner to secure the actual grant to it of a state permit under . . . as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the Federal Act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government.

"[T]he State Code requires that 'the method of construction, operation, maintenance, and equipment of any and all dams in such waters shall be subject to the approval of the Executive Council.' This would subject to state control the very requirements of the project that Congress has placed in the discretion of the Federal Power Commission. A still greater difficulty is illustrated by § 7771. This states the requirements for a state permit as follows:

" '7771 When permit granted. If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and *any water taken from the stream in connection with the project is returned thereto at the nearest practicable place* without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit, upon such terms and conditions as it may prescribe.' (Italics supplied.)

"This strikes at the heart of the present project . . . .

". . . Compliance with state requirements that are in conflict with federal requirements may well block the federal license. For example, compliance with the state requirement, discussed above, that the water of the Cedar River all be returned to it at the nearest practicable place would reduce the project to the small one

which is classified by the Federal Power Commission as 'neither desirable nor adequate.' Similarly, compliance with the engineering requirements of the State Executive Council, if additional to or different from the federal requirements, may well result in duplications of expenditures that would handicap the financial success of the project. Compliance with requirements for a permit that is not to be issued is a procedure so futile that it cannot be imputed to Congress in the absence of an express provision for it. On the other hand, there is ample opportunity for the Federal Power Commission, under the authority expressly given to it by Congress, to require by regulation the presentation of evidence satisfactory to it of the petitioner's compliance with any of the requirements for a state permit on the state waters of Iowa that the Commission considers appropriate to effect the purposes of a federal license on the navigable waters of the United States." With reference to the power of the state and the United States the court said: "In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the States from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two cooperating agencies of government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue. Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority. In fact a contrary policy is indicated in §§ 4(e), 10(a), (b) and (c), and 23(b). In those sections the Act places the responsibility squarely upon federal officials and usually upon the Federal Power Commission. A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable.

'Compliance with the requirements' of such a duplicated system of licensing would be nearly as bad. Conformity to both standards would be impossible in some cases and probably difficult in most of them. . . .

"The securing of an Iowa state permit is not in any sense a condition precedent or an administrative procedure that must be exhausted before securing a federal license. It is a procedure required by the State of Iowa in dealing with its local streams and also with the waters of the United States within that State in the absence of an assumption of jurisdiction by the United States over the navigability of its waters. Now that the Federal Government has taken jurisdiction of such waters under the Federal Power Act, it has not by statute or regulation added the state requirements to its federal requirements . . .

"[This] brings us to consideration of the effect of the Federal Power Act upon it and the related state statutes. We find that when that Act is read in the light of its long and colorful legislative history, it discloses both a vigorous determination of Congress to make progress with the development of the long idle water power resources of the Nation and a determination to avoid unconstitutional invasion of the jurisdiction of the States. The solution reached is to apply the principle of the division of constitutional powers between the State and Federal Governments. This has resulted in a dual system involving the close integration of these powers rather than a dual system of futile duplication of two authorities over the same subject matter.

"The Act leaves to the States their traditional jurisdiction subject to the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce, administer the public lands and reservations of the United States and, in certain cases, exercise authority under the treaties of the United States. These sources of constitutional authority are all applied in the Federal Power Act to the development of the navi-

gable waters of the United States." (First Iowa Coop. v. Power Comm'n., supra, 328 U.S. 152, 167.) And in regard to the effect of the reservation of state jurisdiction (§ 821, supra) the court said: "The effect of § 27 [16 U.S.C.A., § 821] in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase 'any vested right acquired therein' further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words 'other uses.' Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes. This was so held in an early decision by a District Court, relating to § 27 and upholding the constitutionality of the Act, where it was stated that 'a proper construction of the act requires that the words "other uses" shall be construed ejusdem generis with the words "irrigation" and "municipal." ' *Alabama Power Co. v Gulf Power Co.*, 283 F. 606, 619.

"This section therefore is thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the Federal Power Act. It strengthens the argument that, in those fields where rights are not thus 'saved' to the States, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course." (First Iowa Coop. v. Power Comm'n., supra, 328 U.S. 152, 175.) The First Iowa case was followed by Federal Power Commission v. State of Oregon, 75 S.Ct. 832, where the Federal Commission had granted a license to a power company to erect and maintain a power dam on a non-navigable stream on property owned by the United States, with provisions for anadromous fish. Oregon sought a review of the order for a license, asserting that the licensee must have a permit from it and adequate provision was not made for the fish. It was

held that authorization of the project was within the exclusive jurisdiction of the Federal Commission and the State's consent was not necessary. In regard to the claim that the Commission had not made adequate provision for the fish or the fluctuation of the natural flow of the river, the court said: "In this reregulation of the flow of the stream, the Commission acts on behalf of the people of Oregon, as well as others, in seeing to it that the interests of all concerned are adequately protected.

"There remains the effect of the project upon anadromous fish which use these waters as spawning grounds. All agree that the 205-foot dam will cut off access of some fish to their natural spawning grounds above the dam and that such interruption cannot be overcome by fish ladders. However, the State does not flatly prohibit the construction of dams that cut off anadromous fish from their spawning or breeding grounds. One alternative, thus recognized, is the supplying of new breeding pools to which the fish can be removed at appropriate times. The Fish Commission of Oregon has denied a permit to the Portland General Electric Company to carry out its present proposal but there appears to be no disagreement as to the underlying principle involved." (Federal Power Commission v. State of Oregon, supra, 832, 840.) In State of Wash. Dept. of Game v. Federal Power Comm'n., 207 F.2d 391, cert. denied 347 U. S. 936, it was again held that state laws could not enirely block a project on a navigable stream for which a city in Washington was seeking from the commission a license to construct.

Implicit in the foregoing opinions is the concept that the field is not exclusively occupied for all purposes by the Federal Power Act or the Federal Commission. There is a duality of control the extent of which is not specified. While it is clear the state laws may not "veto" projects licensed by the Federal Commission or may the giving of a license be made contingent on the state's consent, that is, the state may not block the project completely, there is nothing

therein indicating that regulatory state laws which do not achieve that end are not proper. There is nothing said about nuisances or danger to the public in the Federal Power Act, and the giving of any remedial relief seems to rest not with the Commission but by court action by the United States Attorney General on request of the Commission. Here we are concerned with the abatement of a nuisance, in a sense a local police measure. The Federal Commission has not purported to adjudicate that question or do anything about it except to have defendant apply for a license for its dams, Copco 1 and 2, which for many years it has maintained without any effort to obtain a license and the Commission has done nothing in regard to the problem. It must be remembered that the present prohibition proceeding goes only to the question of the jurisdiction of the Siskiyou County superior court. The state has not even asked in the action that defendant cease operating its dams; it asks that they be so operated as to not create the danger to the public and the destruction of the fish. Being a jurisdictional question we do not speculate on what the judgment of the Siskiyou court may be. It may find means to alleviate the alleged nuisance without substantially interfering with the power output of the dams. If it has jurisdiction to make any kind of a judgment in the premises—to afford any relief — then it has jurisdiction to try the action. It certainly has general jurisdiction over nuisances and the measures necessary to deal with them. In the First Iowa case, supra, the court likened the Federal Commission to the Interstate Commerce Commission (United States etc. v. Federal Power Commission, 345 U.S. 153) hence Yolo Water etc. Co. v. Superior Court, 43 Cal.App. 332, is pertinent in its statement that the superior court could abate a public nuisance by a public utility although such utilities are subject to regulation by the state Public Utilities Commission under our Constitution (Cal. Const., art. XII, §§ 22, 23 and 23a) and state (Pub. Util. Code). The court said (p. 341): "Powers conferred by the constitution upon the Railroad Commis-

sion to supervise and regulate public utilities and to bring suits to enforce its orders and compel public utilities to obey the law is not inconsistent with the power conferred upon superior courts to entertain injunction suits instituted by others than the commission against public utilities. To so hold will not create any conflict between the courts and the commission, because in all such suits the courts will be bound and guided and controlled in all respects in entertaining and deciding or dismissing them as much by section 23 of the constitution and the Public Utility Act as by any other provision of the law."

Since the Siskiyou County court has jurisdiction in the premises the question of the exhaustion of administrative remedies is not pertinent. The intervention by plaintiff in the Federal Commission proceeding is not of importance because the question is one of jurisdiction over the subject matter and the parties cannot grant or exclude such jurisdiction. Further in that connection it cannot be said that an adequate remedy at law exists; that is, proceedings before the Federal Commission, assuming that such is a jurisdictional question.

There is no merit to defendant's contention that the state Public Utilities Commission has jurisdiction over the subject matter to the exclusion of the superior court. The State Commission is given broad powers to regulate public utilities by our Constitution and statutes, supra. (People v. Western Air Lines, Inc., 42 Cal.2d 621) but the only case which is directly in point on the issues here present is Yolo Water etc. Co., supra, where the court held that a superior court has jurisdiction to abate a nuisance created or maintained by a public utility and neither the public utility law nor the Constitution excludes such jurisdiction. That case has been cited with approval. (Truck Owners etc. v. Superior Court, 94 Cal. 146; Coast Truckers Line v. Ashbury Truck Co., 218 Cal. 337.) While the discussion in the Yolo case may be dictum in part, it is persuasive on the point here involved.

In this same connection defendant claims the instant action would take water rights it was said to have (fluctuation of the stream, Moore v. California Oregon Power Co., 22 Cal. 2d 725, with respect to lower riparian owners) and that a court cannot alter a utilities water rights without the approval of the State Commission, citing Crum v. Mt. Shasta Power Corp., 220 Cal. 245, but those questions go to the scope of the relief which the court may give in the action, questions which are not jurisdictional. Moreover, the grant of jurisdiction to the commission "is not exclusive, and until the . . . commission has acted in reference to any public utility the superior court has jurisdiction in equity to enforce an obligation imposed by law upon such utility." (Miller v. Railroad Commission, 9 Cal.2d 190, 195.)

Defendant urges that respondent court is without jurisdiction in that the issues presented in the action are legislative rather than judicial because the object of the action is to legislate for the future with respect to the regulation of hydroelectric installations on navigable streams and to declare the state's policy in regard to the adjustment of the competing interests, that is, the preservation of fish and maintenance and operation of such dams. Reference is made to studies by a state legislative committee, the state Fish & Game Commission and the Public Utilities Commission at the request of the Legislature, dealing with the fluctuation of the flow of the Klamath River. Reliance is placed on such cases as Werner v. Southern Cal. etc. Newspapers, 35 Cal. 2d 121, Lockhard v. City of Los Angeles, 33 Cal. 2d 453, and Wilson v. Walters, 19 Cal. 2d 111. Those cases say that questions of public policy are primarily for the Legislature and it should choose between conflicting policies. The action does not purport to call upon the court for a legislative declaration of policy on the above mentioned subject. It merely presents the question of what relief if any may be had for the condition which is dangerous to the lives of persons as shown by prior drownings and the destruction of fish. With respect

to the condition, activity or conduct which may constitute a public nuisance, the Legislature has declared that "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway is a nuisance." (Civ. Code, § 3479.) "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." (Civ. Code, § 3480.) "The remedies against a public nuisance are: 1. Indictment or information; 2. A civil action; or, 3. Abatement." (Civ. Code, § 3491.) The attorney general may bring an action to abate a nuisance on behalf of the state and the people. (People v. Truckee Lumber Co., 116 Cal. 397; People ex rel. Roberts v. Beandry, 91 Cal. 213; People v. Glenn-Colusa Irr. Dist., 127 Cal. App. 30.)

The alternative writ is discharged and the petition for a peremptory writ is denied.

CARTER, J.

We Concur:
GIBSON, C. J.
SHENK, J.
TRAYNOR, J.
SCHAUER, J.
SPENCE, J.
McCOMB, J., Pro Tem

[Endorsed]: Filed Dec. 29, 1955. William I. Sullivan, Clerk. By DiNoia, S. F. Deputy.

APPENDIX C
(OPINION OF THE DISTRICT COURT OF APPEAL)

In the District Court of Appeal of the State of California
in and for the Third Appellate District

The California Oregon Power Company, a corporation, Petitioner, vs. The Superior Court of the State of California, in and for the County of Siskiyou, Respondent, The People of the State of California, Real Party in Interest.	3 Civil No. 8383 Filed: Feb 10 1955

Petitioner above named filed in this court a petition for a writ of prohibition to restrain and prohibit the Superior Court of the State of California in and for the County of Siskiyou from proceeding to try an action filed by the State of California against petitioner in the superior court of said county. We issued an alternative writ of prohibition and a return thereto was filed by the State of California on behalf of itself as the real party in interest and of the respondent superior court.

The facts, which appear from the petition and the return, and which are not in substantial dispute, are as follows:

Petitioner is a public utility electric company serving a part of northern California and a part of southern Oregon. Its principal business is in manufacturing, generating and selling electric energy to the public in intrastate and interstate commerce. It owns and maintains two hydroelectric generating plants along and across the Klamath River in the County of Siskiyou, State of California,

Copco No. 1, erected prior to 1918, and Copco No. 2, erected prior to 1925. These plants are what are known as "peak-load plants," in that they are not designed or used to produce power continuously at a high output for meeting the basic, around-the-clock demand for power. While these plants never completely shut down, they operate much of the time at a low rate of output, conserving the water supply available for their operation behind a storage dam. When a "peak" demand for electrical energy exists on the system, the "load" on the lines actuates a mechanism which automatically causes water to be released from the reservoir behind the dam and to flow through the turbines, thus generating electricity to supply the load. When the peak demand decreases the water is automatically withheld behind the storage dam, where it will be available for meeting future peak loads.

Since variations in the peak load occur daily in the system, the result is a daily variation in the amount of water flowing through the plants. Thus, there occurs a periodic fluctuation in the level of the Klamath River below the Copco plants. Apparently these fluctuations are not unusual or extraordinary, and have been occurring in the Klamath River for about a third of a century in the normal course of the petitioner's operations.

In 1947 the Assembly of the State of California adopted the following resolution, House Resolution No. 162:

> "That a request be directed to the Public Utilities Commission of California, asking it to prepare and supply a report as to whether it would be more practical and economically feasible to require the California-Oregon Power Company [sic] to modify their operations or to construct a regulating dam to reduce the present average daily range of artificial fluctuations of the flow of the Klamath River by not less than 50 per cent, and that the Public Utilities Commission be requested to submit a report in response to the above request to the Assembly Interim Committee on Fish and Game not later than January 1, 1948."

In response to this request the Public Utilities Commission published its Study No. S-605, dated December 10, 1947. Petitioner summarizes this study thusly:

> "1. If the fluctuations were reduced at the Copco plants, the Power Company and its customers would be deprived of badly needed peaking capacity;
>
> "2. Construction of a regulating dam by the Power Company could be justified only if some public agency assumes liability for damages to downstream riparians;
>
> [This conclusion was based on the Supreme Court's decision in Moore v. California Oregon Power Co., 22 Cal. 2d 725. See report, page 55.]
>
> "3. Cost of a regulating dam must be borne in equitable part by those who believe they will benefit from it—which does not mean power-users."

This seems to be a fair summary of the report.

After the receipt of this report by the Assembly, by Resolution No. 98 the Senate of the State of California requested a report on the same subject from the Fish and Game Commission:

> "The feasibility of a regulatory dam at Iron Gate on the Klamath River and the advantages of such a dam are matters upon which this Senate needs to be informed in order that it may act advisedly in the premises."

The report submitted by the Fish and Game Commission largely quoted the prior report furnished the Assembly, and concluded by asking for further time to complete the investigation. The Senate, by Resolution No. 151, gave the Fish and Game Commission nearly two years more for further study. The Commission then prepared and submitted to the Senate a second report, dated December 14, 1950, but before it was submitted the Attorney General of the State of California, at the request of the Commission, filed suit against the petitioner, so the Commission refused to make any recommendations to the Senate when the time for its report arrived.

The suit above referred to was instituted in the Superior Court of the State of California, in and for the County of Siskiyou, against petitioner in the name of the state. The complaint was verified by an official of the Division of Fish and Game. The theory of the action was abatement of a public nuisance. The basis for this was that the fluctuations in the level of the Klamath River caused by petitioner's operations endangered and destroyed the life, health and property of the state by (1) killing each year large numbers of fish owned by the state, and (2) causing drownings and otherwise endangering the lives of persons on the river.

The relief sought by the state as pleaded was an injunction against the operation of the plants, and an injunction against interfering with the normal and continual flow of the Klamath River. The state suggested an alternative to this cessation or modification of the operations by the erection of the Iron Gate Dam, downstream from Copco No. 1 and Copco No. 2.

Petitioner interposed a demurrer to the complaint upon the ground, among others, that the court was without jurisdiction to hear or try the cause because (1) this was a matter subject to federal jurisdiction, to wit: the Federal Power Commission, and (2) that, apart from the question of federal jurisdiction, the issues were within the exclusive jurisdiction of the State Public Utilities Commission. The demurrer was overruled on all grounds, and the petitioner made answer on July 11, 1951, to the complaint, again raising the jurisdictional issue. In the answer petitioner also alleged the filing of an application for license to construct the Big Bend No. 2 Development on the Klamath River in Oregon, before the Federal Power Commission, which proceeding involved essentially the same issues as those before the Superior Court, County of Siskiyou.

On November 27, 1951, the Federal Power Commission initiated a proceeding before itself by issuing and serving upon petitioner an order to show cause why it should not be required to apply for

licenses for its existing plants, Copco No. 1 and Copco No. 2, and thereafter consolidated the license application proceeding with the show cause proceeding.

On June 15, 1952, the State of California petitioned to intervene in the Federal Power Commission proceeding, in which petition the state incorporated all of the allegations of the complaint filed by it in the Superior Court, County of Siskiyou. In filing an answer to this petition the petitioner here incorporated into it all the allegations of its answer in the suit filed against it in the Superior Court, County of Siskiyou. A hearing was held before the Federal Power Commission from June 30 to July 3, 1952, wherein the State of California appeared and was, as a result of that hearing, granted the status of a tentative intervener. At the same hearing the State of California also introduced evidence and testimony for the purpose of proving the allegations contained in the complaint in the state court suit, which were incorporated by it into its petition for intervention. On July 3, 1952, the federal proceeding was closed, and the issues presented therein were left pending and undecided. On August 12, 1952, the Federal Power Commission entered its order granting intervention, and the state became a formal party to the proceeding.

On August 6, 1952, the petitioner here gave notice that it would move the Superior Court, County of Siskiyou, for leave to file its amendment to its answer and a supplemental answer, and would also move to dismiss the complaint in the state court suit; further providing that if the motion to dismiss were denied it would move to stay all proceedings in the state court suit until the conclusion of the federal proceeding. All of the motions were heard on September 12, 1952, in the Superior Court, County of Siskiyou, and were denied on September 16, 1952. The state subsequently filed in the Superior Court, County of Siskiyou, a

motion to set the suit for trial, and petitioner thereupon sought a writ of prohibition to have the superior court restrained and prohibited from proceeding to try the cause.

The grounds upon which petitioner relies in support of its petition for prohibition are:

1. The superior court is without jurisdiction;
2. The petitioner will be subjected to irreparable loss and damage and to oppression, harassment and vexatious litigation in that it will be compelled to proceed to trial in the state court suit of the same controversy and the same issues that are the subject of the federal proceeding.

The major contentions urged by petitioner are as follows:

1. Respondent court is without jurisdiction because Congress has occupied the field by a grant of exclusive primary jurisdiction to the Federal Commission and the State has failed to exhaust its remedy before the Commission.
2. Respondent court is without jurisdiction because the State Commission has exclusive state jurisdiction over the subject matter.
3. Respondent court is without jurisdiction in equity because there is an adequate remedy at law.

Petitioner first argues that the respondent court is without jurisdiction to try the action filed by the state because Congress has occupied the field by a grant of exclusive primary jurisdiction to the Federal Power Commission, and the state has failed to exhaust its remedy before the Commission. The state in reply states that none of the cases cited by petitioner which deal with the scope and purview of the Federal Power Act hold that a state court of equitable jurisdiction is precluded from abating a nuisance committed by a public utility corporation which is subject to the licensing provisions of the Federal Power Act.

As to the jurisdiction of the Federal Power Commission petitioner cites the following sections of the Federal Power Act:

> Section 4. "The Commission is hereby authorized and empowered— . . .
>
> "(e) To issue licenses to . . . any corporation organized under the laws of the United States or any State thereof, . . . for the purpose of constructing, operating and maintaining dams . . . [and] powerhouses . . . for the development . . . of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce . . . among the several states . . .;
>
> "(g) Upon its own motion to order an investigation of any occupancy of, . . . for the purpose of developing electric power, . . . streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce . . . among the several States by any person, corporation, State or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and waterpower resources of the region."
>
> Section 23(b). "It shall be unlawful for any person . . . for the purpose of developing electric power, to construct, operate, or maintain any dam, . . . power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, . . . except under and in accordance with the terms of . . . a license granted pursuant to this Act. . . ."

Also, in respect to matters of life, health and property, a specific provision of the Federal Power Act is cited by petitioner:

> Section 10. "All licenses issued under this Part shall be on the following conditions: . . . (c) That the licensee . . . shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health and property. . . ."

In support of its contention that the field has been occupied by Congress through its grant of exclusive primary jurisdiction to the Federal Power Commission, petitioner cites the case of First Iowa Hydro-Electric Coop. v. Federal Power Commission, 328 U.S. 152, which case involved a writ of certiorari to review a judgment affirming a dismissal of an application for a license to construct a water power project by the Federal Power Commission. The Commission had dismissed the application because the applicant had not complied with section 9(b) of the Federal Power Act in submitting satisfactory evidence to the Commission that it had met all necessary requirements of the laws of the state in which it contemplated constructing the project. In reversing the affirmance of the dismissal the Supreme Court said, at pages 167-168:

> "In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the states from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two cooperating agencies of Government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue. Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority. In fact a contrary policy is indicated in sections 4(e), 10(a)(b) and (c), and 23(b). In those sections the Act places the responsibility squarely upon federal officials and usually upon the Federal Power Commission. A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable. 'Compliance with the requirements' of such a duplicated system of licensing would be nearly as bad. Conformity to both standards would be impossible in some cases and probably difficult in most of them."

And at page 181:

> "The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls."

At page 182 the court also quoted from the case of United States v. Appalachian Electric Power Co., 311 U.S. 377, 405 and 426, which case had to do with the general problem before us and the one before the Supreme Court in the Iowa case:

> " 'The states possess control of the waters within their borders, "subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers." It is this subordinate local control that, even as to navigable rivers, creates between the respective governments a contrariety of interests relating to the regulation and protection of waters through licenses, the operation of structures and the acquisition of projects at the end of the license term. But there is no doubt that the United States possesses the power to control the erection of structures in navigable waters.
>
> * * * * * * *
>
> " 'The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government. The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power. Even if there were no such relationship the plenary power of Congress over navigable waters would empower it to deny the privilege of constructing an obstruction in those waters. It may likewise grant the privilege on terms. It is no objection to the terms and to the exertion of the power that "its exercise is attended by the same incidents which attend the exercise of the police power of the states." The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment.' "

Subsequent to the issuance of the alternative writ of prohibition by this court, after a hearing in which the State of California par-

ticipated as an intervener, the Federal Power Commission determined that "the Klamath River in Oregon and California is a navigable stream of the United States" and that "By reason of the occupancy of navigable waters of the United States and use of surplus waters from a government dam, each and all of the five hydroelectric developments of The California Oregon Power Company, on the Klamath or Link River [including Copco No. 1 and Copco No. 2], are subject to the licensing authority of the Commission, as set forth in Section 4(e) of the Federal Power Act." The Federal Power Commission ordered that petitioner herein file applications for license for the existing plants of Copco No. 1 and Copco No. 2, and the Commission also reserved the right to determine at a later date whether all of the power developments constructed, operated and maintained by petitioner on the Klamath River shall be encompassed by a single license, and also "Whether or not such single license, if required, should contain a provision reserving the Commission's authority in the interests of protection of life, health, and property, to require the installation of reregulating facilities at or near the Iron Gate site on the lower Klamath River, in California, after notice and opportunity for hearing."

It is therefore clear not only that the Klamath River is a navigable stream and that all power installations in or on said river are within the exclusive jurisdiction and control of the Federal Power Commission under the Federal Power Act but it is also clear that the Federal Power Commission has assumed jurisdiction over all power installations in said river. The State of California, in the action filed in the Superior Court in Siskiyou County, is seeking to interfere with, regulate, alter or control the power installations of petitioner. To be sure the state asserts that it is only seeking to abate a nuisance and prevent destruction of life and property, but the indisputable fact remains that what the state asserts is a nuisance can only be abated by the cessation of the operations by petitioner of plants Copco No. 1 and Copco No. 2 or the instal-

lation of a regulating dam at Iron Canyon. Under the Federal Power Act it appears that in no event could petitioner erect this dam without a license from the Federal Power Commission so to do. If, pursuant to a state court decree the petitioner did undertake to construct the Iron Gate Dam, it could be enjoined from so doing without a license, or a determination by the Commission that one is not needed. (U. S. v. Appalachian Electric Power Co., supra; 16 U.S.C.A., secs. 820, 825(m).) Of course, the state suggested an alternative to erecting Iron Gate Dam, namely, that petitioner could modify or cease its operations in order to stop the fluctuation in the level of the Klamath River. We are convinced that the subject matter of the action filed by the state against petitioner is one within the exclusive jurisdiction of the Federal Power Commission and that no duality of control exists. The Federal Power Act gives the Commission broad power to prescribe the operations of plants licensed by it. (See 16 U.S.C.A., sec. 799.) The Commission has taken under consideration Copco's entire operation. If it licenses petitioner and directs the manner of operation to continue as it now is, and a state court enjoins petitioner from operating as it now is so as to stop the fluctuation in the level of the Klamath River, the petitioner in obeying that mandate would be acting in violation of the terms of its license. Again it would be subject to action by the Commission for this violation, causing a possible suspension or revocation of its license, or an injunction ordering petitioner to resume operations pursuant to the terms of the license. (16 U.S.C.A., secs. 820, 825(m).)

We are therefore of the opinion that the state court is not entitled to proceed with the action filed by the state in the Superior Court when the Federal Power Commission has already taken the matter under submission and will conceivably grant a license with conditions of operation therein that may nullify the force of the state court decree, even if the court had jurisdiction to grant it. Viewing the comprehensive nature of the Federal Power Act, and considering that the Act and orders of the Commission are the

supreme law of the land, we entertain no doubt that the matter is solely within the jurisdiction of the Commission. As stated in Bethlehem Steel Co. v. New York Labor Relations Board, 330 U.S. 767, 772:

> "It long has been the rule that exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting."

As stated in Adler v. Chicago & Southern Air Lines, Inc., 41 F. Supp. 366:

> " . . . when Congress has created an administrative commission, board or other agency with jurisdiction over and power to regulate some particular field of endeavor, the courts, both state and federal, are without jurisdiction or power to grant relief to any person complaining of any act done or omitted to have been done, if the act or omission is of such a nature as to be within the sphere of regulation of the administrative agency involved, until such time as the person complaining has exhausted his remedies before such administrative body."

We agree with the contention of petitioner that before the state would be entitled to proceed with any action such as the instant action it must first exhaust its administrative remedy before the Federal Power Commission. As stated by Chief Justice Gibson in Abelleira v. District Court of Appeal, 17 Cal. 2d 280, at page 292:

> "In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act. The authorities to this effect are so numerous that only the more important ones need be cited here as illustrations. [Citing numerous cases.]"

And as stated in United States v. Superior Court, 19 Cal. 2d 189, at page 194:

> "It is now firmly established in this state that a litigant must invoke and exhaust an administrative remedy provided

by statute before he may resort to the courts. Jurisdiction to entertain an action for judicial relief is conditioned upon a completion of the administrative procedure. (Abelleira v. District Court of Appeal, 17 Cal. (2d) 280 [109 Pac. (2d) 942, 132 A. L. R. 715].)"

The Federal Power Act gives a broad remedy in matters such as those in issue. See 16 U.S.C.A., section 825(c), to the effect that "Any person, State, municipality or State commission complaining of anything done or omitted to be done by any licensee or public utility in contravention of the provisions of this chapter may apply to the commission. . . ." The Act goes on to provide for investigation and hearings. Thus it is clear that the state is given a remedy before the Commission, and it also appears that the state has appeared and intervened in the proceedings before the Commission. We cannot assume that the state will not obtain, from the Federal Power Commission and the federal courts, any relief to which it is entitled.

We therefore conclude that because the Klamath River is a navigable stream and by reason of the provisions of the Federal Power Act all power installations in or on said river are within the exclusive jurisdiction of the Federal Power Commission, and that until the proceedings before the Federal Power Commission are concluded the State of California is not entitled to bring to trial in the Superior Court the action which it has filed in Siskiyou County.

It is unnecessary to discuss the other contentions urged in the briefs.

Let the writ of prohibition issue.

SCHOTTKY, J.

We concur:
VAN DYKE, P.J.
PEEK, J.

APPENDIX D
(RELATED OPINION OF THE FEDERAL POWER COMMISSION)

United States of America
Federal Power Commission

OPINION NO. 266

In the Matters of The California Oregon Power Company	Project No. 2082 and Docket No. E-6390

Before Commissioners:

Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith, Dale E. Doty and Seaborn L. Digby.

* * * * * * *

These are proceedings under the Federal Power Act (1) on an application filed April 19, 1951 by The California Oregon Power Company (hereinafter called Copco or Applicant) for a license for the proposed Big Bend No. 2 hydroelectric development, designated as Project No. 2082, at mile 223 on the Klamath River, a point about 13 miles upstream from the California-Oregon boundary line, and (2) on an order to show cause (Docket No. E-6390) issued by this Commission on November 28, 1951 as to whether any or all of Copco's five existing hydroelectric developments on the Klamath River in Oregon and California are subject to the licensing requirements of the Federal Power Act.

The Klamath River system has its headwaters in the Williamson River, the source of which is a spring located on the Klamath Indian Reservation. Upper Klamath Lake is a shallow body of water about 20 miles long and 6 miles wide which discharges at the City of Klamath Falls into a one-mile-long connection known as Link River, which in turn discharges into Lake Ewauna, a body of water about 2 miles long and a half-mile wide, which gradually

narrows at its lower end and becomes the Klamath River. The Klamath flows thence in a general southwesterly direction into California and on to the Pacific Ocean.

In view of the widespread interest in the two matters, we ordered a public hearing which was held in Klamath Falls, Oregon. On July 7, 1953, the Presiding Examiner issued his Initial Decision in the Docket No. E-6390 proceeding, and on October 2, 1953 issued his Initial Decision in the Project No. 2082 proceeding. The Examiner found that proposed Project No. 2082 would occupy navigable waters and lands of the United States; would affect the interests of interstate commerce (1) by causing noticeable fluctuations in downstream navigable capacity of the Klamath River and (2) by utilizing waters for the generation of electric energy for transmission in interstate commerce; and would utilize surplus water from a Government dam. And, he concluded that proposed Project No. 2082 is subject to the Commission's licensing authority.

In addition, the Examiner found that all of the existing projects occupy navigable waters of the United States; (that two of the projects, Copco No. 1 and Copco No. 2, produce noticeable fluctuations in the navigable capacity of the Klamath River, and in such way affect the interests of interstate commerce) that they utilize waters for the generation of electric energy for transmission in interstate commerce and in that way affect the interests of interstate commerce; that they utilize surplus water from a Government dam; and, he concluded that all of the existing projects are subject to the licensing authority of the Commission.

Exceptions to the Examiner's Initial Decisions were filed by Copco and others and oral argument was held before the Commission, the argument being limited to the jurisdictional issues raised by the exceptions. In the exceptions none of the parties questioned the finding with respect to navigability, nor that Project No. 2082 would occupy lands of the United States, but parties did

object, as being unnecessary, to the assertion of jurisdiction on any other basis.

We have reviewed the evidence of record respecting navigability and we affirm the Examiner's conclusion that the Klamath River system constitutes navigable waters of the United States, and consequently proposed Project No. 2082 and the five existing projects are subject to the licensing authority of the Commission under Part I of the Federal Power Act.

* * * * * * *

Appropriate orders will issue in these proceedings in conformity with this Opinion.

By the Commission. Commissioner Doty concurring in the result only.

(Seal)

LEON M. FUQUAY,
Leon M. Fuquay
Secretary.

Adopted: January 27, 1954
Issued: January 28, 1954

APPENDIX E

(RELATED FEDERAL POWER COMMISSION ORDERS)

United States of America
Federal Power Commission

Before Commissioners:
Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith, Dale E. Doty and Seaborn L. Digby

In the Matter of The California Oregon Power Company	Project No. 2082

ORDER ISSUING LICENSE (MAJOR)

Application was filed April 19, 1951 by The California Oregon Power Company, of Yreca, California, for a license under the Federal Power Act for a proposed hydroelectrc development, designated as Project No. 2082, to be located on the Klamath River in Klamath County, Oregon, and affecting public lands of the United States.

* * * * * * *

Upon consideration of the record in the above-entitled proceeding, the briefs of the parties filed in connection therewith, the Examiner's Initial Decision and the exceptions thereto, the oral argument upon such exceptions, and having this day issued our Opinion No. 266, which is hereby incorporated herein by reference and made a part hereof, the Commission further *finds:*

* * * * * * *

(4) The proposed Big Bend No. 2 project would be located in and along a navigable water of the United States.

* * * * * * *

The Commission *orders:*

(A) This license is issued to The California Oregon Power Company, of Yreka, California, under Section 4(e) of the Federal Power Act for a period of fifty (50) years, effective as of the first day of the month in which the acceptance hereof is filed with the Commission, for the construction, operation, and maintenance of Project No. 2082, subject to the terms and conditions of the Act which is incorporated by reference as a part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act, * * *

Article 30. The Commission reserves the right to determine at a later date the following matters: * * *

(b) Whether or not Project 2082 and other constructed developments operated and maintained by the Licensee on the Klamath River and the Link River shall be encompassed by a single license as being parts of a complete unit of improvement or development;

(c) Whether or not such single license, if required, should contain a provision reserving the Commission's authority in the interests of protection of life, health, and property, to require the installation of re-regulating facilities at or near the Iron Gate site on the lower Klamath River, in California, after notice and opportunity for hearing.

* * * * * * *

By the Commission. Commissioner Doty concurring in the result only.

(Seal)

LEON M. FUQUAY,
Leon M. Fuquay
Secretary.

Adopted: January 27, 1954
Issued: January 28, 1954

* * * * * * *

United States of America
Federal Power Commission

Before Commissioners:

Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith, Dale E. Doty and Seaborn L. Digby.

In the Matter of The California Oregon Power Company	Docket No. E-6390

ORDER REQUIRING FILING OF APPLICATION OR APPLICATIONS FOR LICENSES FOR MAJOR PROJECTS

Upon consideration of the record in the above-entitled proceeding, the briefs, Examiner's Initial Decision and exceptions thereto, and the arguments adduced, and having this day issued its Opinion No. 266, which is incorporated by reference and made a part hereof, the Commission further *finds:*

(1) The Klamath River, in Oregon and California, is a navigable water of the United States.

(2) Upper Klamath Lake, Lake Ewauna, and Link River, in Oregon, constitute navigable waters of the United States.

(3) The five existing hydroelectric developments involved in this proceeding, their location, capacities, and their dates of construction, are as follows:

Name	Date	Capacity	Location
Eastside	1924	3,200 kw (Oregon)	Mile 254
Westside	1908	600 kw (Oregon)	Mile 254
Keno	1914	760 kw (Oregon)	Mile 234
Copco No. 1	1918	20,000 kw (California)	Mile 198
Copco No. 2	1925	27,000 kw (California)	Mile 196

* * * * * * *

(6) By reason of the occupancy of navigable waters of the United States and use of surplus waters from a government dam, each and all of the five hydroelectric developments of The California Oregon Power Company, on the Klamath or Link River, are subject to the licensing authority of the Commission, as set forth in Section 4(e) of the Federal Power Act.

* * * * * * *

The Commission *orders:*

(A) The California Oregon Power Company shall file an application or applications for licenses under the Federal Power Act for the continued operation and maintenance of its Eastside, Westside, Keno, Copco No. 1 and Copco No. 2 hydroelectric developments.

* * * * * * *

By the Commission. Commissioner Doty concurring in the result only.

(Seal)

LEON M. FUQUAY,
Leon M. Fuquay
Secretary.

Adopted: January 27, 1954
Issued: January 28, 1954

APPENDIX F

(EXCERPTS FROM THE RECORD SHOWING HOW THE FEDERAL QUESTIONS WERE RAISED)

[R. 3] 3 Civil No. 8383

In the
District Court of Appeal
State of California
Third Appellate District

The California Oregon Power Company,
a corporation,
Petitioner,

vs.

The Superior Court of the State of California
in and for the County of Siskiyou,
Respondent.

PETITION FOR WRIT OF PROHIBITION

The Petition of The California Oregon Power Company respectfully shows:

I.

Petitioner is now, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of California, authorized to do and doing business in the States of California and Oregon, and having its principal place of business in the Town of Yreka City, County of Siskiyou, State of California.

[R. 4] II.

Power Company is now, and at all times herein mentioned was, a public utility corporation engaged in the business of manufactur-

ing, generating and selling electric energy to the public in intrastate and interstate commerce in the Counties of Shasta, Trinity, Modoc, Siskiyou and Del Norte in the State of California, and in the Counties of Lake, Klamath, Jackson, Curry, Josephine, Douglas, Coos and Lane in the State of Oregon.

III.

The Klamath River arises at the south end of Upper Klamath Lake in the State of Oregon and flows thence into the State of California and through the Counties of Siskiyou, Humboldt and Del Norte to the Pacific Ocean, and is navigable from its source to its mouth.

IV.

Prior to the year 1918 Power Company built a dam and hydroelectric generating plant along and across the Klamath River in the County of Siskiyou, State of California, known as "Copco No. 1"; and prior to the year 1925 Power Company built a second hydroelectric generating plant along said River in said County of Siskiyou, downstream from Copco No. 1, known as "Copco No. 2."

V.

Said plants are, and at all times since their construction have been, peak load plants, operated in parallel and controlled by the demand for power from time to time existing on Power Company's interstate distribution system. An increased demand for power in the system results in an [R. 5] increase in the volume of water released for the generation of the additional power needed in the system. When the demand decreases the water is withheld in storage so as to conserve water required for future use in the generation of electric power. The periodic increase and decrease in public demand for power results in daily fluctuation of the level of the Klamath River below said plants.

* * * * * * *

[R. 6] * * * VIII.

On or about June 19, 1950, the Attorney General of the State of California, at the instance of the Department of Fish and Game, filed an action, in the name of the People [R. 7] of the State of California, in the Respondent Superior Court of the State of California in and for the County of Siskiyou, numbered therein 13995, and entitled *"The People of the State of California, Plaintiff v. California Oregon Power Company, a corporation, et al., Defendants."*[7] Power Company is the principal and only defendant in said action and the only defendant who has been served with summons or appeared therein.

IX.

The subject matter of the state court suit is the alleged effect upon life, health and property of the operation by Power Company of the aforesaid hydroelectric plants on the Klamath River, and the resultant creation of fluctuations in said River.

* * * * * * *

[R. 8] * * * XII.

By virtue of the provisions of the Federal Power Act, the Congress of the United States created the Federal Power Commission and conferred upon said Commission power and jurisdiction over all dams and powerhouses along or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce among the several States, including power and jurisdiction to make rules and regulations for the protection [R. 9] of life, health and property in the operation of such dams and power houses, to investigate occupancy of any such streams for the purpose of developing electric power and to issue such orders as the Federal Commission may deem appropriate, and to enforce its said rules, regulations and orders; with exclu-

7. A true copy of the complaint in the state court suit is attached hereto, marked "Exhibit 1" and made a part hereof.

sive jurisdiction in the United States Court of Appeals to review and to affirm, modify or set aside any such rules, regulations or orders.

XIII.

On September 27, 1950 Power Company filed a Demurrer to Complaint and Memorandum of Points and Authorities in the state court suit[12] upon the ground, among other things, that Respondent was without jurisdiction of the subject matter of the action for the reasons therein stated.

* * * * * * *

XV.

On or about May 17, 1951 Respondent made and entered an order overruling the aforesaid demurrer filed by Power Company.

* * * * * * *

[R. 10] * * * XVII.

On July 11, 1951, Power Company filed its Answer to Complaint in the state court suit.[15] In and by said Answer Power Company again called to the attention of Respondent its lack of jurisdiction over the subject matter of the state court suit.

XVIII.

On or about November 27, 1951 the Federal Commission initiated a proceeding before itself entitled *"In the Matter of The California Oregon Power Company,"* Docket No. E-6390, by the issuance and service upon Power Company of an Order to Show Cause why Power Company should [R. 11] not apply for and procure from it a license or separate licenses to maintain and

12. A true copy of the Demurrer to Complaint and Memorandum of Points and Authorities is attached hereto, marked "Exhibit 2" and made a part hereof.

15. A true copy of the Answer to Complaint is attached hereto, marked "Exhibit 4" and made a part hereof. * * *

operate Power Company's existing dams and powerhouses on the Klamath River, including said Copco No. 1 and No. 2 The subject matter of the Federal proceeding includes the conditions, if any, to be embraced in any such license or licenses when issued.

XIX.

On or about May 1, 1952 the Federal Commission ordered that the application proceeding be consolidated with the Federal Proceeding for the purposes of a hearing.

XX.

On or about June 15, 1952 the Attorney General of the State of California, at the instance of the Department, filed in the Federal proceeding, in the name of the State, a Petition for Leave to Intervene, in which the State incorporated all the allegations of the complaint in the state court suit. On June 23, 1952, Power Company filed in the Federal proceeding an Answer to Petition of State of California for Leave to Intervene, in which Power Company incorporated all the allegations of its answer in the state court suit.

XXI.

During the period June 30 to July 3, 1952 a hearing was held by the Federal Commission in the Federal proceeding. The said Attorney-General appeared at said hearing on [R. 12] behalf of the State, and upon his application the State was granted the status of a tentative intervener in the Federal proceeding; and the said Attorney-General participated in said hearing, and introduced evidence and testimony for the purpose of proving the allegations contained in the complaint in the state court suit and for the purpose of obtaining from the Federal Commission the relief sought to be obtained by the state court suit.

XXII.

The said hearing in the Federal proceeding was closed on July 3, 1952 and the issues tried therein are pending and undecided before the Federal Commission.

XXIII.

On August 12, 1952 the Federal Commission in the Federal proceeding made and entered its Order Granting Intervention and the State thereupon became and now is a formal party to the Federal proceeding.

XXIV.

On August 6, 1952 Power Company filed in the state court suit a Notice of Motion and Memorandum of Points and Authorities,[21] giving notice that Power Company would move Respondent Court for leave to file its Amendment to Answer and Supplemental Answer,[22] and would move to [R. 13] dismiss the complaint in the state court suit, and if the motion to dismiss the complaint be denied, to stay all proceedings in the state court suit until the conclusion of the Federal proceeding. * * *

XXV.

Said motions were heard by Respondent on September 12, 1952 pursuant to Stipulation[26] which provided that said motions might be based, in addition to the matters specified in the Notice, upon a Second Amendment to Answer,[27] to which was attached a true

21. A true copy of the Notice of Motion and Memorandum of Points and Authorities is attached hereto, marked "Exhibit 9" and made a part hereof.

22. A true copy of the proposed Amendment to Answer and Supplemental Answer is attached hereto, marked "Exhibit 10" and made a part hereof.

26. A true copy of the Stipulation is attached hereto, marked "Exhibit 12" and made a part hereof.

27. A true copy of the proposed Second Amendment to Answer is attached hereto, marked "Exhibit 13" and made a part hereof.

copy of the Federal Commission's Order Granting Intervention. Said Stipulation and its attachments were filed in open court at the hearing of said motions.

* * * * * * *

[R. 14] * * * XXVII.

On September 16, 1952 Respondent made and entered an order denying the aforesaid motions made by Power Company.

* * * * * * *

XXVIII.

The Attorney-General has filed in Respondent Court a motion to set the state court suit for trial, and unless Respondent is restrained and prohibited by this Court it will proceed forthwith to try the same; and thereby Power Company will be subjected to irreparable loss and damage and to oppression, harassment and vexatious litigation in that it will be compelled to proceed to trial in the state court suit of the same controversy and the same issues that are the subject of the Federal proceeding and will be confronted with the risk of a decision and judgment of Respondent Court in conflict with whatever order may be issued by the [R. 15] Federal Commission; and in that no appeal from or review of the Federal proceeding can be had in this Court, or in any other court except the United States Court of Appeals; and Power Company has no plain, speedy or adequate remedy in the ordinary course of law.

WHEREFORE, Power Company prays that an Alternative Writ of Prohibition issue to Respondent Court, upon notice to the State, commanding Respondent to desist and refrain from any further proceedings in the state court suit, except to dismiss the same, until the further order of this Court, and to show cause why it should not be absolutely restrained from any further proceedings in that action; that on the return of said Alternative Writ the same

be made peremptory; and for such other relief as is meet in the premises.

BROBECK, PHLEGER & HARRISON
Attorneys for Petitioner.

[Verification and filing endorsement omitted]

* * * * * * *

[R. 17] EXHIBIT 1

FRED N. HOWSER, Attorney General
of the State of California
RALPH W. SCOTT, Deputy
600 State Building,
San Francisco 2, California
Telephone: UNderhill 1-8700
Attorneys for Plaintiff

In the Superior Court of the State of California
In and for the County of Siskiyou

The People of the State of California, Plaintiff, vs. California Oregon Power Company, a corporation, First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Sixth Doe, Seventh Doe, Eighth Doe, Ninth Doe and Tenth Doe, Defendants.	No. 13995

COMPLAINT FOR INJUNCTION AND ABATEMENT OF NUISANCE

Plaintiff complains of defendants above named and for cause of action alleges that:

I.

At the time of filing this complaint, Fred N. Howser was and now is the duly elected, qualified and acting Attorney General of the State of California.

II.

For many years last past the defendant California Oregon Power Company has been and now is a corporation organ-[R. 18] ized and existing under and by virtue of the laws of the State of California. Said defendant is referred to hereinafter as the power company.

III.

Plaintiff does not know the true names or identities of defendants First Doe to Tenth Doe inclusive, but whenever ascertained prays leave to insert each of the same herein together with all allegations to charge each of them properly.

IV.

Since time immemorial the Klamath River has been and now is a natural stream of water flowing in part through the counties of Siskiyou, Humboldt and Del Norte to the Pacific Ocean. Said Klamath River has been and now is navigable from its mouth to its confluence with the Shasta River in the County of Siskiyou. Said Klamath River has been and now is frequented by great numbers of trout, salmon and other fish. For many years last past the said Klamath River has been and now is regularly stocked with trout and salmon by the State of California and that the upper reaches of said Klamath River in said State and its tributaries have been and now are the natural spawning grounds of said fish, particularly trout and salmon. All of said fish are the property of the State of California and are held in trust by it for its people. All of said fish have been and now are valuable items of food and diet for the people of said State.

V.

Ever since the year 1917, or thereabouts, the power company has been and now is engaged in the manufacture and generation of electric current and power and as such has [R. 19] been and now is a public utility operating and conducting business in the State

of California. During said years the power company has owned, operated, controlled and maintained and does now own, operate, control and maintain hydroelectric power or generating plants on the Klamath River in the County of Siskiyou at a place commonly known as Copco, California. As a part of said hydroelectric plants the power company constructed in the year 1917, or thereabouts, and does now own, operate and maintain two dams across the natural channel of said Klamath River at the place aforesaid.

VI.

By means of said dams and hydroelectric plants and during said years, the power company has controlled, regulated and fluctuated and does now control, regulate and fluctuate the natural and normal flow of the waters of the said River for the purposes aforesaid. During said years the power company has generated and manufactured and does now generate and manufacture electric current or power only during certain portions of each day. In thus manufacturing and generating said electric current the power company has in the normal course of its operations suddenly, abruptly and artifically fluctuated and does now suddenly, abruptly and artificially fluctuate the flow of water in said River by raising and lowering respectively the level or the amount of water in said River when the generation of electric current at said power plants begins and ends. Plaintiff is informed and believes and therefore alleges that the flow of water in said River is suddenly and abruptly increased or raised from 200 cubic feet per second, more or [R. 20] less, to 3000 cubic feet per second, more or less, when said hydroelectric plants are put in operation by the power company, and conversely is as suddenly and abruptly decreased or lowered when said power plants are temporarily shut down for the day.

VII.

As a result of the aforesaid acts of the power company, large and expansive areas of the bed, banks and bars along said River

for a distance of 75 miles, more or less, downstream from Copco, California, have been and now are being suddenly and abruptly uncovered or drained of water when or about the time or times said hydroelectric plants are shut down temporarily, thereby causing large numbers of fish [to-wit, approximately 1,900,000 per year], particularly young trout and salmon, to be killed and destroyed by stranding on said portions of the bed, banks and bars of said River thus exposed or left without water to the great and irreparable damage and injury of this plaintiff.

VIII.

The aforesaid acts of the power company are without right, power or authority on its part to commit, are in violation of the rights of this plaintiff, and constitute and are a public nuisance.

IX.

Although demand has been made upon the power company it has failed and refused and does now fail and refuse to abate the aforesaid nuisance and to operate and maintain its said hydroelectric plants and said dams by regulating [R. 21] the flow of the said Klamath River in such a manner that large numbers of fish will not be stranded, killed and destroyed as hereinabove alleged. The power company continues, threatens to continue and will so continue said wrongful acts unless restrained and enjoined by this Honorable Court. Plaintiff has no plain, speedy or adequate remedy at law, and the aforesaid acts of the power company have been and now are an obstruction to the free use of the property of this plaintiff, to-wit: the said fish, so as to interfere with the comfortable enjoyment thereof by the people of the State of California.

As and for a second, separate and distinct cause of action against defendants, plaintiff refers to paragraphs I, II, III, IV, V, VI, and VIII of its first cause of action, incorporates said paragraph herein as though set out in full, and in addition thereto alleges that:

1.

As a result of the aforesaid acts of the power company a wave front, caused by the sudden and abrupt release of water by the power company at said dams and hydroelectric plants, travels down said River wherever said hydroelectric plants have been and are placed into operation by the power company after temporary shut down, thereby endangering and imperiling public safety and creating a condition in said River inimical to public welfare. In this respect, plaintiff is informed and believes and therefore alleges that during the period May 4, 1940 to October 8, 1948, inclusive, there have been 14 persons drowned along the navigable and other portions of said River due to the [R. 22] sudden and unheralded arrival of the aforesaid wave fronts of water. The aforesaid acts of said power company are thus injurious to the health, safety and/or welfare of the people of the State of California who use the said River for recreational and other purposes, and obstructs their free use of said River in the customary manner.

2.

The power company continues, threatens to continue and will so continue said wrongful acts unless restrained and enjoined by this Honorable Court. Plaintiff has no plain, speedy or adequate remedy at law.

WHEREFORE, plaintiff prays judgment against defendants as follows:

1. That the aforesaid nuisances be abated;

2. That the defendant power company, its agents, servants, employees and all persons acting under its direction, control and authority, and each of them, be perpetually restrained and enjoined from maintaining and operating the said dams and hydroelectric plants in the manner hereinabove set forth.

3. That the defendant power company, its agents, servants, employees and all persons acting under its direction, control and

authority, and each of them, be perpetually restrained and enjoined from interfering with the continual and normal flow of the Klamath River in such manner or to such extent that fish are killed and destroyed due to stranding, or in such manner as to endanger the public health, safety or welfare, or in such manner as to obstruct the free use of said River in a customary manner by the people of the State of California.

[R. 23] 4. That plaintiff be awarded its costs of suit incurred herein and such other and further relief as to the Court may seem meet and proper in the premises.

FRED N. HOWSER
Fred N. Howser, Attorney General
RALPH W. SCOTT
Ralph W. Scott, Deputy
Attorneys for Plaintiff.

[verification and filing endorsement omitted]

[R. 24] EXHIBIT 2

[Title of court and cause omitted]

No. 13995

DEMURRER TO COMPLAINT

Comes now the defendant California Oregon Power Company, and demurs to the complaint in the above-entitled action on the following grounds, that is to say:

* * * * * * *

IV.

The court has no jurisdiction of the subject matter of the action.

* * * * * * *

[R. 29] * * * MEMORANDUM OF POINTS AND AUTHORITIES

I.

The action involves the Klamath River, which is alleged in the complaint to be a navigable stream. It is also an interstate stream. Exclusive jurisdiction over the operation, maintenance, and construction of dams and other power developments in navigable waters is with the Federal Power Commission.

First Iowa Co-op. v. Federal Power Commission, 328 U.S. 152 (1946);

Federal Power Act, Sec. 23 (1920), as amended, 16 U.S.C.A. Sec. 817 (1941).

The power to regulate includes the power to control its operation in a manner to avoid imperilment to life, health or property.

Federal Power Act, Sec. 10(c), 16 U.S.C.A. Sec. 803(c).

* * * * * * *

[R. 31] * * * As to the remedy available before the Federal Power Commission, the rule to be applied is that of the United States Court and it is inflexible that the remedy before the Federal Administrative Agency is exclusive.

Thompson v. Texas-Mexican Ry. Co., 328 U.S. 134, 147-151 (1946).

* * * * * * *

[R. 35] EXHIBIT 4

[Title of court and cause omitted]

No. 13995

ANSWER TO COMPLAINT

* * * * * * *

[R. 40] * * * As and for an affirmative defense against the complaint of plaintiff, Power Company alleges:

I.

THE CALIFORNIA OREGON POWER COMPANY (hereafter called Power Company) is now and at all times material hereto has been a corporation organized and existing under the laws of the State of California.

[R. 41] II.

Power Company for many years last past has been and it now is a public utility hydroelectric corporation engaged in the County of Siskiyou, State of California, and in other portions of said State, and in the State of Oregon, in the production, generation and interstate distribution of electric power and current and is a public utility corporation subject to administrative regulation by the State of Oregon, the State of California and the United States of America.

III.

Prior to the year 1918 Power Company built a dam and hydroelectric generating plant in the County of Siskiyou known as Copco No. 1 and prior to the year 1925 built a dam and hydroelectric generating plant in the County of Siskiyou across the Klamath River known as Copco No. 2, and ever since has owned and maintained, and now owns and maintains, each of said dams and hydroelectric generating plants.

IV.

The Klamath River rises at the south end of Upper Klamath Lake in the State of Oregon and flows thence in a generally southerly direction to the Oregon-California boundary through the County of Siskiyou and thence in a general southerly and westerly direction to the Pacific Ocean. The Klamath River is navigable in fact and in law from its source to its mouth.

V.

Power Company's dams at Copco No. 1 and Copco No. 2 ever since the years 1918 and 1925, respectively, have been and now are

used and operated in conjunction with its hy-[R. 42]droelectric power plants at said dams. Said plants are peakload plants and are operated automatically by the demand for power from time to time existing on Power Company's distribution system served thereby. When the demand for power increases in the system the water is automatically released for the generation of the additional power needed in the system. When the demand decreases the water is automatically withheld in storage so as to conserve water for future use in the generation of electric power. Such releasing and withholding of water is a slow and gradual process and takes from one-half hour to two hours to change from minimum to maximum streamflow and back again. The process occurs daily and results in periodic fluctuation in the level of the Klamath River.

* * * * * * *

As and for a second and separate affirmative defense Power Company alleges:

I.

Power Company incorporates herein by reference paragraphs I, II, III and IV of its first affirmative defense.

[R. 43] II.

By reason of the foregoing and of the Acts of Congress and statutes of the United States in such case made and provided Power Company is subject to the power and jurisdiction of the Federal Power Commission in the operation of its dams aforesaid and in the interstate generation and distribution of electric current.

III.

The jurisdiction of the Federal Power Commission over public utilities subject to its regulation is exclusive.

As and for a third and separate affirmative defense Power Company alleges:

I.

Power Company incorporates herein by reference the allegations of paragraphs I, II, III and IV of its first affirmative defense and paragraphs II and III of its second affirmative defense.

II.

On or about April 16, 1951 Power Company filed with the Federal Power Commission a certain "Application for License," a true copy of which is attached hereto, marked "Exhibit A" and made a part hereof. By the filing of said application, Power Company has invoked the jurisdiction of the Federal Power Commission over all of Power Company's operations upon the Klamath River.

* * * * * * *

[R. 44] * * * As and for a fifth and separate affirmative defense Power Company alleges:

I.

Power Company incorporates herein by reference paragraphs I, II, III and IV of its first affirmative defense.

II.

This Court is without power or jurisdiction to hear or determine any matter, fact or thing relating to any power development on any interstate navigable stream. All power and jurisdiction to hear and determine all such matters, facts and things is by the Constitution of the United States vested in the government of the United States of America.

As and for a sixth and separate affirmative defense Power Company alleges:

I.

Power Company incorporates herein by reference paragraphs I, II, III, IV and V of its first affirmative defense, paragraphs I, II and III of its second affirmative defense, and paragraph II of its third affirmative defense.

[R. 45] II.

The Federal Power Commission has power and jurisdiction to require Power Company to accept a license for any dam maintained on a navigable stream and has power to include as a condition in such license the maintenance of such conditions and methods thereat as will be compatible with public health, safety and welfare and fish life.

* * * * * * *

[R. 48] * * * II.

This Court has no power or jurisdiction to require Power Company, a public utility corporation, to invest its funds in the construction of a dam. On the contrary, the sole power and authority to order such construction resides in the Public Utilities Commission of the State of California, or in the Federal Power Commission.

WHEREFORE, defendant THE CALIFORNIA OREGON POWER COMPANY, prays that the plaintiff take nothing by its complaint but that the same be dismissed with costs.

* * * * * * *

[verification and filing endorsement omitted]

[R. 87] EXHIBIT 9

[Title of court and cause omitted]

No. 13995

NOTICE OF MOTION

To: The People of the State of California, Plaintiff and to Hon. Edmund G. Brown and Ralph W. Scott, Esq., its attorneys:

Please Take Notice that on September 22 1952 at 10:00 A.M. at the Courtroom of the above-entitled Court at the Courthouse in Yreka, California, defendant The California Oregon Power Company will move said Court as follows:

(1) For leave to file its Amendment to Answer and Supplemental Answer;

(2) To dismiss the complaint;

(3) If the motion to dismiss the complaint be denied, to abate the action and stay all proceedings therein until the conclusion of those certain proceedings before the Federal Power Commission entitled "In the Matter of The California Oregon Power Company," Docket No. E-6390 and Project No. 2082.

Said motions will be made upon the following grounds:

(1) That this Court has no jurisdiction of the subject matter of this action;

(2) That since the filing of the Answer herein such proceedings have been had before the Federal Power Commission that any exercise of any jurisdiction of this Court herein, except to dismiss the complaint, or in the alternative to stay this action, would result in a conflict of jurisdiction between this Court and the Federal Power Commission;

[R. 88] (3) That the plaintiff herein has voluntarily submitted itself and all the issues in this case to the jurisdiction of the Federal Power Commission.

* * * * * * *

[R. 94] EXHIBIT 10

[Title of court and cause omitted]

No. 13995

AMENDMENT TO ANSWER AND SUPPLEMENTAL ANSWER

Comes now THE CALIFORNIA OREGON POWER COMPANY, a corporation, sued herein as "California Oregon Power Company, a corporation" (hereinafter called Power Company), and for an Amendment to Answer and Supplemental Answer alleges:

– I.

On or about November 27, 1951, in that certain proceeding before the Federal Power Commission (hereinafter called "the Commission") entitled "In the Matter of The California Oregon Power Company," Docket No. E-6390, the Commission duly issued its Order to Show Cause, a true copy of which is attached hereto, marked "Exhibit B" and made a part hereof.

II.

In and by said Order to Show Cause the Commission ordered, among other things, that Power Company show cause why it should not be required by the Commission to file an Application for License pursuant to the terms of the Federal Power Act, as amended, 16 U.S.C. Sections 791-823, covering the dams and power plants referred to in the complaint on file herein.

III.

The subject matter of said proceeding before the Commission is the right of Power Company to maintain the dams referred to in the complaint on file herein and the [R. 95] conditions to be attached to said right under federal law including the measures, if any, necessary and proper for the protection of life, health and property in the maintenance and operation of said dams and power plants by Power Company.

IV.

On or about May 1, 1952 the Commission ordered that the proceeding on said Order to Show Cause, Docket No. E-6390 be consolidated with the proceeding on the Application for License, Project No. 2082, referred to in the third affirmative defense in Power Company's Answer on file herein, and further ordered that a public hearing be held in said consolidated proceedings at Klamath Falls, Oregon on June 30, 1952.

V.

On or about June 15, 1952 the plaintiff herein filed with the Commission its Petition of State of California For Leave to Intervene in said consolidated proceedings, a true copy of which is attached hereto, marked "Exhibit C" and made a part hereof. Said plaintiff incorporated by reference in said Petition for Leave to Intervene all the allegations of its Complaint on file herein.

VI.

Thereafter and on June 30, 1952 said plaintiff by its attorney appeared at said hearing before the Commission in Klamath Falls, Oregon, and participated therein, and offered the testimony of witnesses and documentary evidence which it deemed relevant to the issues raised by the said Petition for Leave to Intervene.

[R. 96] VII.

The said hearing was closed on July 3, 1952 and the issues therein are now submitted to and are pending and undecided before the Commission.

WHEREFORE, Power Company prays that plaintiff take nothing by its complaint, but that the same be dismissed with costs.

[verification, etc. omitted]

* * * * * * *

[R. 100] EXHIBIT 12

[Title of court and cause omitted]

No. 13995

STIPULATION

IT IS HEREBY STIPULATED by and between the plaintiff above-named and defendant The California Oregon Power Company, as follows:

1. The motion of said defendant for leave to file its Amendment to Answer and Supplemental Answer, to dismiss the com-

plaint and if the motion to dismiss the complaint be denied to abate the action and stay all proceedings therein, may be heard * * *

2. Said motion may be made upon the grounds to be asserted by defendant (in addition to the grounds stated in the Notice heretofore served and filed) that the Federal Power Commission has granted a petition by plaintiff herein to become a party to a proceeding in which plaintiff submitted the issues in this action to said Commission and plaintiff is now party thereto.

3. Said motion will be based upon (in addition to the matters stated in the Notice heretofore served and filed) the Second Amendment to Answer and copy of ORDER GRANTING INTERVENTION attached hereto, and it is stipulated that the latter is a true copy of an Order made by the Fed-[R. 101]eral Power Commission on August 12, 1952 and issued August 14, 1952.

Dated: September 12, 1952.

[Signatures of attorneys for the parties and filing endorsement omitted]

[R. 102] EXHIBIT 13

[Title of court and cause omitted]

No. 13995

SECOND AMENDMENT TO ANSWER

Comes now THE CALIFORNIA OREGON POWER COMPANY, a corporation, sued herein as "California Oregon Power Company, a corporation" and for Second Amendment to Answer to the complaint, by way of amendment to its Amendment to Answer and Supplemental Answer, and by way of addition of paragraph VIII thereto, alleges:

VIII.

That on August 12, 1952, in the aforesaid consolidated proceedings before the Federal Power Commission, Project No. 2082 and Docket No. E-6390, the said Commission made its Order Granting Intervention, a true copy of which is attached hereto, marked "Exhibit D" and made a part hereof; that plaintiff herein thereupon became and now is a party to said proceedings.

WHEREFORE, Power Company prays that plaintiff take nothing by its complaint but that the same be dismissed with costs.

* * * * * * *

APPENDIX G

In The Superior Court of the State of Washington
In and For the County of Thurston

The City of Tacoma, a municipal corporation, Plaintiff, v. The Taxpayers of Tacoma, Washington; and Robert Schoettler, as Director of Fisheries, and John A. Biggs, as Director of Game, of the State of Washington, and The State of Washington, a sovereign state, Defendants.	No. 26572

JUDGMENT

This matter coming on regularly for trial, without a jury, on the 11th day of January, 1956, on plaintiff's amended complaint, the amended answer and cross-complaint of defendants, State of Washington, Robert Schoettler, director of fisheries, and John A. Biggs, director of game, and the answer and affirmative defense of E. R. McKee, representative taxpayer; plaintiff appearing by E. K. Murray, special counsel, and Frank L. Bannon, chief assistant city attorney; defendants, State of Washington, Robert Schoettler, director of fisheries, and John A. Biggs, director of game, appearing by Don Eastvold, attorney general, Joseph T. Mijich and E. P. Donnelly, assistant attorneys general; and E. R. McKee, defendant taxpayer, appearing by John S. Lynch; * * *

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the question of damage to fish which might result from construction of plaintiff's Cowlitz Project was passed upon by the Federal Power Commission and the Federal Courts and is not now a proper one for consideration by this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Sections 27 and 36, Chapter 117, Laws of 1917, as amended (R.C.W. 90.20.010 and 90.28.060) are inapplicable to said project insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of plaintiff's License for said project, or insofar as they would enable State officials to exercise a veto over said project.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the provisions of Chapter 9, Laws of 1949, (R.C.W. 75.20.010 et seq), and Sections 46, and 49, Chapter 112, Laws of 1949, as amended (R.C.W. 72.20.050 and 75.20.100), are inapplicable to said project insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of plaintiff's License for said project, or insofar as they would enable State officials to exercise a veto over said project.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff is acting illegally and in excess of its authority in the construction of the Mayfield and Mossyrock hydroelectric project as presently proposed for the reason that said project would necessarily impede, obstruct or interfere with public navigation contrary to the proviso of R.C.W. 80.40.010 et seq.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the injunction pendente lite, entered October 7, 1955, be continued in effect until July 1, 1956, from and after which later date plaintiff is hereby enjoined from spending any sums of money relating to the Mayfield and Mossyrock hydroelectric project.

* * * * * * *

DONE IN OPEN COURT this 6th day of March, 1956.

/s/ CHARLES T. WRIGHT
Judge

* * * * * * *

APPENDIX H

(OPINION OF THE ATTORNEY GENERAL OF OREGON AND LETTERS TO THE DISTRICT ATTORNEY OF JEFFERSON COUNTY AND BAKER COUNTY)

STATE OF OREGON
Department of Justice
Salem, Oregon

February 29, 1956

Honorable Robert J. Steward
State Representative
Keating, Oregon

Dear Representative Steward:

This will acknowledge your letter with reference to the construction of the hydroelectric dams by the Idaho Power Company on the Snake River at the Brownlee and Hells Canyon sites.

The legal problem presented by you has been under continuous personal study by me since the Pelton decision by the United States Supreme Court since I have shared your concern for the necessity of protecting the rights of Oregon citizens, both present and future, against all encroachments.

I am now prepared to state my conclusions on the principal matters involved here.

Your inquiries are directly concerned with the appropriation of water for hydroelectric purposes under the Oregon Hydroelectric Act. You make no reference to the authority of the Idaho Power Company to act under the license granted by the Federal Power Commission nor do I consider it necessary to pass upon that question under the facts of the present case.

You state that Idaho Power Company has for some time been actively engaged in the construction of the power projects in question. According to our information this construction is being carried on by the Morrison-Knudsen Construction Company and the work has been projected to the Oregon side of the Snake River.

Idaho Power, by seeking application for a preliminary permit from the Hydroelectric Commission of Oregon, has submitted itself to the state's jurisdiction. The company has asked the Hydroelectric Commission to approve this application and issue a license with the accompanying right to appropriate a certain quantity of water from the Snake River. In approving this application the Oregon Hydroelectric Commission must follow Oregon law and be governed by the mandatory limitations imposed therein, regardless of the rights and privileges granted under the Federal Power Act, until otherwise determined by the Supreme Court of Oregon.

In view of the fact that the Idaho Power Company has made application to the Hydroelectric Commission of Oregon for a preliminary permit, and to my knowledge the commission has not waived any of the statutory requirements for such permit, I advise you that the applicant, the Idaho Power Company, is in violation of the provisions of the Oregon law and subject to the criminal penalties imposed under ORS 543.990(2).

Accordingly I am today advising the District Attorney of Baker County of this interpretation of our statutes, since as you know he is by law the official in your county authorized to initiate a prosecution in this case.

Your questions concerning future appropriations of waters of the Snake River and its tributaries involve matters that rest entirely upon what rights are initiated and perfected under Oregon water law and the action of the United States in demanding such waters in the exercise of its dominant serviture in the interest of navigation.

Very truly yours,

ROBERT Y. THORNTON
Attorney General

RYT ri

STATE OF OREGON
Department of Justice
Salem, Oregon

February 29, 1956

Honorable Warren H. Albright
District Attorney, Jefferson County
Madras, Oregon

Dear Mr. Albright:

There is transmitted herewith for your information a copy of an opinion rendered this date to State Representative Robert J. Steward of Baker County. According to information reaching this office, it appears that the Portland General Electric Company is proceeding to construct the Pelton Dam without obtaining a license from the Hydroelectric Commission of Oregon.

This appears to be a plain violation of the Oregon law.

ORS 543.120 reads as follows:

> "After February 26, 1931, no water power project involving the use of the waters of lakes, rivers, streams or other bodies of water within this state, including waters over which this state has concurrent jurisdiction, for the generation of electricity, shall be begun or constructed except in conformity with the provisions of ORS 543.010 to 543.620."

ORS 543.990(2) provides:

> "Any person who wilfully fails or refuses to comply with any of the provisions of ORS 543.010 to 543.620, * * * shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or both."

In view of the fact that the Portland General Electric Company has made application to the Hydroelectric Commission for a preliminary permit and to my knowledge the commission has not waived any of the statutory requirements for such permit, it is my

opinion that the applicant, the Portland General Electric Company, is in violation of the provisions of Oregon law and subject to the criminal penalties imposed under ORS 543.990(2).

Accordingly it is requested that you cause an investigation to be made to determine if, as reported in the press, the Portland General Electric Company, its agents and employes, are now carrying on construction of the Pelton Dam in your county in violation of ORS 543.120. If so, it is requested that criminal proceedings be instituted against the Portland General Electric Company under the provisions of ORS 543.990(2).

Very truly yours,

ROBERT Y. THORNTON
Attorney General

RYT vw
Enclosure

STATE OF OREGON
Department of Justice
Salem, Oregon

February 29, 1956

Honorable Robert F. Vaughan
District Attorney, Baker County
Baker, Oregon

Dear Mr. Vaughan:

There is transmitted herewith for your information a copy of an opinion rendered this date to State Representative Robert J. Steward of Baker County. From the facts set out in Representative Steward's letter, as well as reports in the press, it appears that the Idaho Power Company, in proceeding with construction of the Brownlee and Hells Canyon dams on the Snake River without obtaining a license from the Hydroelectric Commission of Oregon, is in violation of Oregon law.

* * * * * * *

In view of the fact that the Idaho Power Company has made application to the Hydroelectric Commission for a preliminary permit and to my knowledge the commission has not waived any of the statutory requirements for such permit, it is my opinion that the applicant, the Idaho Power Company, is in violation of the provisions of Oregon law and subject to the criminal penalties imposed under ORS 543.990(2).

Accordingly it is requested that you cause an investigation to be made to determine if, as reported by Representative Steward, that the Idaho Power Company, its agents and employes, are now carrying on construction of the Brownlee and Hells Canyon dams in your county in violation of ORS 543.120. If so, it is requested that criminal proceedings be instituted against the Idaho Power Company under the provisions of ORS 543.990(2).

Very truly yours,

ROBERT Y. THORNTON
Attorney General

RYT vw
Enclosure